



REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
2864 F
OF
THE STATE OF MISSOURI.

HORATIO M. JONES,
REPORTER.

VOL. XXII.

ST. LOUIS:
GEORGE KNAPP & CO., PUBLISHERS.
1856.

Entered according to Act of Congress, in the year 1856, by

GEORGE KNAPP & CO.,

In the Clerk's office of the District Court of the District of Missouri.

JUDGES OF THE SUPREME COURT OF THE STATE OF
MISSOURI.

HON. WILLIAM SCOTT,
HON. JOHN F. RYLAND,
HON. ABIEL LEONARD.

The cases of *The State v. Hays* and *Pacific Railroad v. The Governor*, (application for a *mandamus*,) decided at the January term of the Supreme Court, have not been reported in this volume, for the reason that the dissenting opinions of Judges SCOTT and LEONARD, in those cases respectively, have not been prepared and filed in time for insertion.

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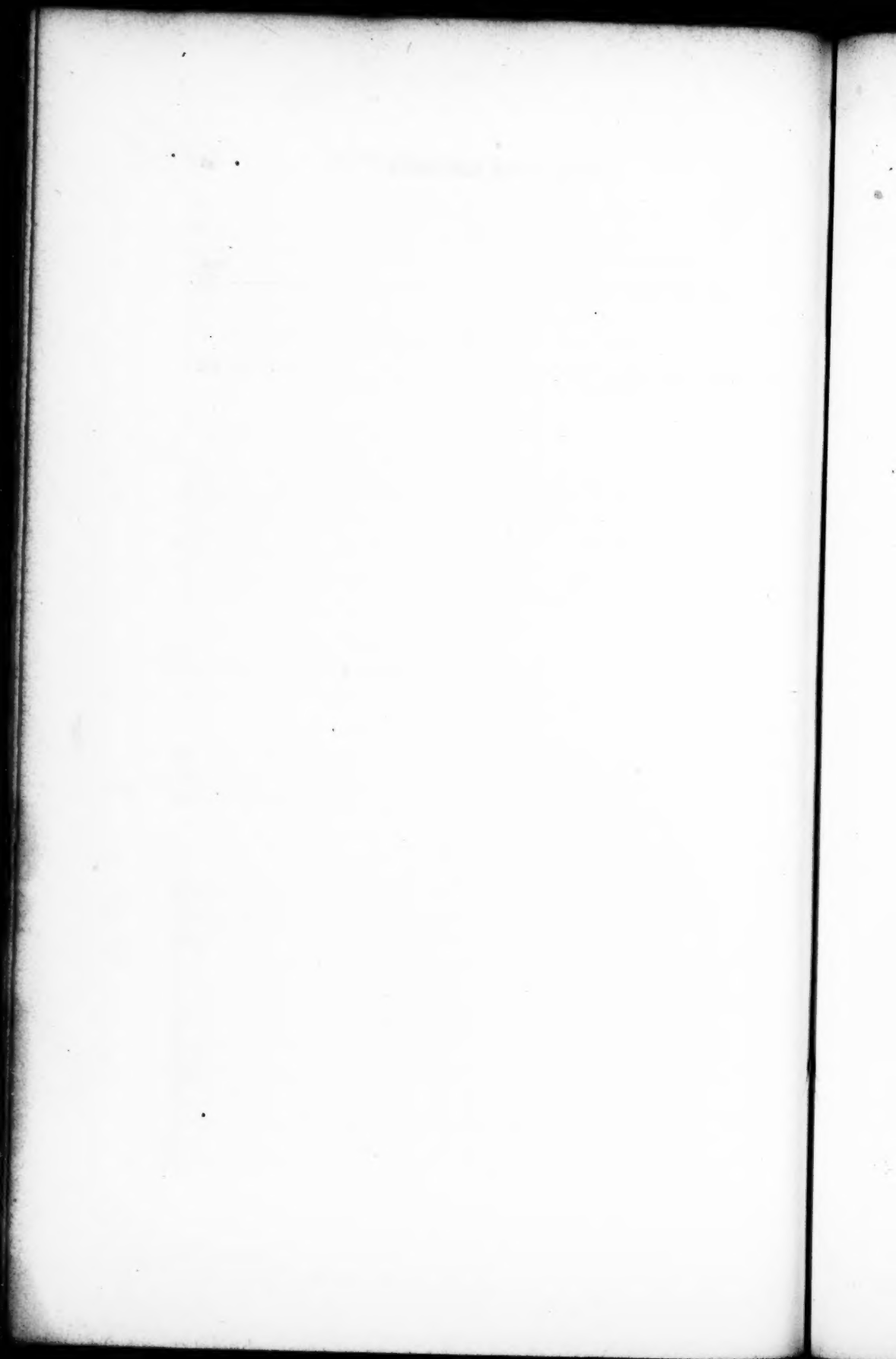
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Green v. Nelson
April 1867.

CASES

ARGUED AND DETERMINED

IN
THE SUPREME COURT

OF

THE STATE OF MISSOURI,

OCTOBER TERM, 1855, AT ST. LOUIS.

[CONTINUED FROM VOL. XXI.]

WOODSON, Respondent, vs. SKINNER AND BRECK, Appellants.

1. A power to "annul a sale" of a lot in the St. Louis common, made under the authority of "an act to authorize the sale of the St. Louis common," approved March 18, 1835, is substantially pursued by declaring the lot "forfeited to the city of St. Louis."
2. The seventh section of the above act provided that the "board" of aldermen of the city of St. Louis might, by resolution, &c., "annul" a sale made under the said act, upon the non-payment of interest due; in a deed of the "mayor, aldermen and citizens of the city of St. Louis," dated March 10, 1836, made under said act, a power was reserved to the "mayor and aldermen" to "annul the sale" upon the non-payment of interest: held, that it was the intent of the act that the body in which the legislative power of the city should at the time reside, should annul the sale; that, consequently, a resolution of the city council, consisting of the board of aldermen and board of delegates, (to whom by the act of February 8th, 1839, the legislative power of the city had passed,) approved January 3, 1841, declaring a lot "forfeited to the city of St. Louis, was a good annulment of the sale of said lot."

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3. The city of St. Louis has a fee simple title to its common, and may, under its charter, pass such a title to a purchaser.
4. There is a marked difference between a forfeiture imposed by a statute and one arising under the contract of parties. In the one case it can not be relieved against; in the other, it may.

Appeal from St. Louis Land Court.

This was an action, in the nature of an action of ejectment, to recover possession of the south-east quarter of block No. 79, in the St. Louis common. It is alleged in the petition that on the 23d day of June, 1848, the "city of St. Louis," being the owner in fee simple of the above tract of land, conveyed the same to John Laughton and D. H. Armstrong, who, on the 24th day of October, 1849, conveyed to the plaintiff, Woodson. The defendants, in their answer, set up a prior title from the city of St. Louis, under a previous corporate name, and allege that "the mayor and aldermen of the city of St. Louis, claiming the power to dispose of said premises under an act of the general assembly of the state of Missouri, entitled "An act to authorize the sale of the St. Louis common," approved March 18, 1835, by indenture of lease dated March 10, 1836, leased said premises to Nathaniel B. Atwood, for a term of fifty years from date of said lease, which term has not expired. The defendants claim under the said Atwood.

Upon the trial, the plaintiff showed the original title of the inhabitants of St. Louis to the common, which it is unnecessary to set forth here. Plaintiff then introduced in evidence a deed dated June 23d, 1848, from the city of St. Louis, to John Laughton and David H. Armstrong, purporting to convey the premises in controversy in the present suit; also a deed of conveyance of the same premises from the said Laughton and Armstrong to plaintiff, Woodson, dated October 24, 1849. There was evidence tending to show the value of the premises claimed to be \$16,000, also tending to show the yearly value of the same. The plaintiff here rested, and the defendant then introduced in evidence a deed, dated March 10, 1836, of the

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mayor, aldermen and citizens of St. Louis, (the corporate name at the date of the deed) to Nathaniel B. Atwood ; which deed is as follows : " This indenture, made at the city of St. Louis, Missouri, the 10th day of March, 1836, by and between the mayor, aldermen and citizens of the city of St. Louis, of the county of St. Louis, and state of Missouri, of the one part, and Nathaniel B. Atwood, &c., (of same place) of the other part, to comply with the ninth section of ' An act to authorize the sale of the St. Louis common,' approved March 18, 1835, *witnesseth*, that the mayor, aldermen and citizens of the city of St. Louis, for and in consideration of the rents reserved, &c., have demised, granted and to farm let, and by these presents do demise, grant and to farm let unto the said Atwood, his executors, administrators and assigns, all that lot, messuage or tract of land, situate within the limits of the St. Louis common, in the county aforesaid, containing 9 and 70-100ths acres, and described as follows : The S. E. $\frac{1}{4}$, block 79, of the survey of the St. Louis common, made by Charles DeWard, by order and direction of the board of aldermen of the city of St. Louis, together with all the rights, members and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the rent, issues and profits thereof : *To have and to hold* the said lot, messuage and tract of land, and all and singular the premises hereby demised, with the appurtenances, unto the said Atwood, his executors, administrators and assigns, from the date hereof, for and during the term, and upon the condition following, being those prescribed by an act of the general assembly of the state of Missouri, passed March 18, 1835, entitled ' An act to authorize the sale of the St. Louis common.' That is to say :

" 1st. Yielding and paying for the same as a yearly rent, unto the mayor, aldermen and citizens of the city of St. Louis, and their successors, the interest of five per cent. a year on the amount bid for said lot or parcel of ground, being the sum of \$36 86, at the expiration of one year from the date of these presents ; and to secure the payment of which a note has been

executed by the said Atwood, and the like sum at the expiration of every year thereafter.

" 2d. That at the end of fifty years from the day of sale, being the 8th day of March, 1886, and every fifty years thereafter, and after the assessment made by the public assessor, agreeably to the act of the general assembly above mentioned, the said Atwood shall pay five per centum a year upon such assessed value as a yearly rent.

" 3d. That should the interest aforesaid remain unpaid for six months after due, the mayor and aldermen of the city aforesaid may annul the sale, and proceed to sell again, according to the act of the assembly aforesaid.

" 4th. That at the expiration of ten years from the day of sale, or at any time after such term, if the annual per cent. aforesaid be duly paid, the said Atwood may pay the sum of \$737 20, being the amount bid for the lot aforesaid, and receive a deed in fee simple, with special warranty only against the inhabitants of the city of St. Louis, and all persons claiming under them; and the said Atwood," &c., (here follows a covenant to pay the rent, &c.)

" In witness whereof, the parties aforesaid have executed this deed in duplicate, the mayor of the city of St. Louis and the city register signing their names, and causing the common seal of the city of St. Louis to be affixed to both parts, and the said Atwood signing his name and affixing his seal to both parts of this indenture, on the 10th day of March, 1836.

" JOHN F. DARBY, Mayor.

" NATH'L. B. ATWOOD, (seal.)

" J. A. WHEERRY, Register, (seal of city.)"

The defendants also gave in evidence a deed from N. B. Atwood to J. W. Skinner, the defendant, assigning to said Skinner a portion of his (Atwood's) interest in the premises. This deed is dated September 6th, 1850.

The plaintiff then in rebuttal introduced Socrates Newman, who testified that he was the register of the city of St. Louis, and that ordinances 766 and 2826, as they appear in the vol-

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ume of published ordinances, were duly enrolled on the records of the board of aldermen and board of delegates of the city council. These ordinances were then offered in evidence, and admitted in evidence against objection of defendants. Ordinance 766, approved January 3d, 1841, is as follows :

“ A joint resolution providing for the forfeiture and sale of certain lots in the city common.

“ Whereas, the parties hereinafter named have failed to comply with the conditions of sale set forth in the conveyances to them made respectively of lots in the city common, viz., being in arrears for more than six months' interest on their respective purchase ; and, whereas, by the conveyance made to them, the right of forfeiture is reserved to the city in certain cases therein provided :

“ Be it resolved by the city council of the city of St. Louis, that the following described lots in the city common are hereby declared forfeited to the city of St. Louis, viz : (among others) a lot sold to N. B. Atwood, containing nine and $\frac{7}{8}$ acres, being the south-east quarter of block seventy-nine,” &c.

There was a further resolution ordering the forfeited lots to be sold again. Ordinance 2826, approved June 19, 1852, is as follows :

“ Joint resolution concerning the city common. Whereas, there have been verbal criticisms upon the phraseology of the several resolutions of the board of aldermen annulling the sales of certain lots in the St. Louis common ; that any apprehension of subsequent purchasers may be quieted, be it resolved by the board of aldermen and board of delegates of the city of St. Louis, that, inasmuch as the interest or rent reserved to be paid to the mayor, aldermen, and citizens of the city of St. Louis, in the respective deeds made by the mayor, aldermen, and citizens of the city of St. Louis, and the interest or rent reserved to be paid to the city of St. Louis in the deeds made by the city of St. Louis to the purchaser, and for the lots in the St. Louis common hereinafter named, has remained unpaid either

to the mayor, aldermen, and citizens of the city of St. Louis, or the said city of St. Louis, for more than six months after the same became due and payable, which said lot and the names of the purchasers thereof are as follows (among others): a lot sold to N. B. Atwood, containing nine acres and seventy-one-hundredths, being the south-east quarter of block 79.

"Now, therefore, the said several sales of lots in the St. Louis common above named, and to the purchasers above named, are hereby annulled, and are declared null and void."

Plaintiff then introduced Robert Simpson, who testified that he was comptroller of the city of St. Louis in the year 1841, and had the control of the St. Louis common. He knew of the sale of the premises to N. B. Atwood, and that he failed to pay the rent due under the lease to him more than six months after it was due, and that he was actually unable to pay. It was the practice to put the accounts in the hands of a collector, and if they were not paid to put them in suit. He had no doubt it was so done in this case. On cross-examination, witness stated that he had never called on Atwood for the rent, and could not recollect the time when the rent bills were put in the hands of the collector. The court, upon motion of plaintiff, gave the following instruction:

"If the jury find from the evidence that, at the time of the passage of the resolutions offered in evidence, (ordinances Nos. 766 and 2826,) a year's rent or interest, to be paid by N. B. Atwood to the mayor, aldermen and citizens of the city of St. Louis, by virtue of the indenture given in evidence, dated March 10, 1837, was in arrear and had remained unpaid for six months after due, then said sale to Atwood was by said ordinance annulled; and if the jury believe in the genuineness of the instruments by which plaintiff deduces title from the city as read in evidence, they must find for the plaintiff."

To the giving of this instruction, the defendant duly excepted.

An instruction asked for by the defendants was given. Several instructions asked by the defendants were refused by the

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court. It is unnecessary to set these forth, as all the questions of law discussed arise upon the giving of the instruction above set forth. There was a verdict and judgment for plaintiff, and defendants appealed.

J. W. Skinner, for self and other defendants, appellants.

1. The lease to Atwood was not annulled by ordinances 766 and 2826. The act of March 18, 1835, authorized a lease. From an examination of the character of the act, we may see that the prominent features take rightly a leasehold character. The subject of the act—commons—are not properly or generally subjects of sale. (See Bac. Abr. tit. Common.) The object of the act was to provide a yearly fund for the support of schools. Though styled "An act to authorize a sale," &c., it in part authorizes only a sale to fix the rent, or a contract to sell, whereby at a public auction the bidder states what sum he may pay in ten years or more. He is forbidden to pay under ten years, and he is not bound to pay it any time. He is to enter into covenant to pay rent for fifty years, and on a re-assessment after fifty years to pay a rent on the re-assessment. These peculiar and remarkable features of the act show that the prime object was not to sell, in order to transfer the absolute property, but to make the sale a means of ascertaining the amount of rent to be paid. The indenture of March 10, 1836, vested a leasehold in Atwood. It is not a deed of conveyance upon a sale; no words of conveyance, or covenant for the conveyance of a fee are to be found in it. It merely gives permission to receive a deed of conveyance in the future. The words used are "demised, grant and to farm let." These are the operative words of a lease. The term extends to fifty years certainly; and if the provision concerning the extension is valid, for fifty years longer, at least, subject to re-assessment. If that provision be pronounced invalid, it is limited to fifty years.

In Plowd. 271, "a lease for ten years, lessee to pay in tiles at the end of every ten years, and have a perpetual demise of the premise, from ten years to ten years, forever; it was held

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that it was a good lease for ten or twenty years, and that if the condition had been properly worded, it would have made a good perpetual demise." Bac. Ab. Leases, 633, 835, 890. Thus the indenture has all the qualities of a good lease, and none of a conditional sale.

"In a lease to a man for eight years, rendering rent yearly, and if he should hold over to have the fee to him and his heirs forever, on covenant for rent brought within eight years: held, it was a lease and not a conditional fee." Plowd. 271.

"When a lease is made by A. to B. for five years, with the privilege of a fee on paying a certain sum in two years," this is held by Littleton to be "a lease united to a conditional fee, *pro tempore*." Plowd. 271, Co. Litt. II. p. 11. This decision is misquoted and misapplied (18 John. 174). See *City of St. Louis v. Morton*, (6 Mo. Rep. 480). If this indenture is a conditional deed, the law of forfeiture is still applicable, so far as the lease extends, and the forfeiture must be taken in the same way. (18 John. 174.) The city had power to make the lease. (13 Mo. 606.) The leasehold interest of Atwood can be divested against his will only by forfeiture or ejectment. As there is an interest in possession under the lease, and an interest in future under the permission to receive a deed, which are entirely separable, so the penalties are separable which affect either of them. A penalty may be imposed by which, under certain contingencies, our right to the fee may be cut off, yet leave the lease good. If the city intends to annul the sale, it must proceed in the manner directed in the act. If it would forfeit our lease (the act and deed being silent) it must proceed according to law. The common law requires, as necessary to a forfeiture, a demand of the rent, on the ground, at the last hour of the last day. (Dumfries' case, 4 Coke, 119; 1 Saund. 287; Cowp. 804; 17 Johns. 66; 1 How. 211.) Our statute requires an action of ejectment by landlord as a substitute for the demand under the common law. Neither of these is claimed to exist in this case. Ordinances 766 and 2826 did not affect the leasehold interest created by the inden-

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ture of March 10, 1836. The first attempted it in vain. The second did not attempt to affect it. The right of "forfeiture" is not reserved to the city of St. Louis. The city council and the city of St. Louis are strangers to our contract. The forfeiture claimed is exercised under an assumed power to forfeit reserved in the deed. If no power to forfeit is found in the deed, the forfeiture is invalid. The power to annul the sale is not a power to forfeit. The power to annul the sale was given by the act of March 10, 1835, to the "mayor and aldermen," and not to the corporation. No mention is made of a power to their successors. The charter under which they acted as the agent of the corporation was extinguished February 8th, 1839. In this new charter there is no reservation of the power to annul the sales made by the "mayor and aldermen." See *Charleston R.* 342. Ordinance 2826, if operative at all, affects only whatever interest, right or contract we have for the fee. It leaves the lease, under which alone we claim, unaffected and unimpaired. The city authorities may have meant to forfeit the lease, but did not adopt apt means to accomplish their object. This ordinance was passed without any demand of rent, and without notice to those claiming under the indenture of March 10, 1836; also long after the conveyance to Laughton and Armstrong, on June 23, 1848. 2. The annulment of the sale to Atwood did not revert a fee simple in the city of St. Louis. It was not proven that the city, before the sale to Atwood, was the absolute owner of the premises in fee simple. (*Reily v. Chouquette*, 18 Mo. 225; see also 1 McLean, 41; 6 Wheat. 597; 2 Kent's Com. 277, 262; 1 Black. Com. 475; Co. Litt. 2; 1 Hallam's Mid Ages, 165; 6 Mo. 524, 481; 11 Mo. 150; 13 Mo. 611, 431; 6 N. H. 269.) 3. The verdict of the jury as to damages was not sustained by the evidence.

B. Bates, for respondent.

SCOTT, Judge, delivered the opinion of the court.

The main point in the argument for appellants was founded in the conception, that the deed which has given rise to this

controversy was similar as to the estate or interest conveyed by it to that conveyed by the indenture in the case of *Say v. Smith*, Plowden, 271. It is only necessary to look at that case in order to be satisfied that this is a misconception. In the case cited, the lease is only for the term of ten years fully to be complete. The lessee agreed at the end of the said term, to pay ten thousand tiles, or the value thereof in money; and it was further agreed, that if the ten thousand tiles should be punctually paid at the end of every ten years, the lessee should have a perpetual demise. In that case, the judges take the distinction between a conditional lease and condition to have a lease, and in that distinction consists the difference between the case under consideration and of *Say v. Smith*.

We do not deem it necessary to enter into any discussion as to the proper name of the instrument executed by the authorities of the city of St. Louis to N. B. Atwood, under whom the appellants claim. The instrument was effectual to convey away all the interest the city had in the premises in dispute, and a compliance with its terms on the part of the lessee and his assigns, would have effectually barred all right the city might have had in the lot. It is true, there were conditions annexed in the instrument on the performance of which the lessee or his assigns would have been entitled to an estate in fee. But these conditions constituted no separate and distinct estate; they were mere incidents to the lease or sale, and would naturally terminate with it. Any act which avoided or annulled the lease would destroy all conditions annexed to it.

How, then, does this case stand? The instrument under which the appellants claim, purports to have been made in compliance with the ninth section of the act of the general assembly, entitled "An act to authorize the sale of the St. Louis commons," approved March 18, 1835. This instrument is a substantial compliance with the act. It is, in effect, a perpetual lease, with a privilege in the lessee to convert it into an estate in fee, by complying with the conditions contained in the instrument of lease. There is also a clause in the deed by

which the mayor and aldermen of the city are authorized to annul the sale upon the non-payment of interest on the purchase money as stipulated. This clause is inserted in virtue of an express provision in the act of assembly empowering the city to sell her commons. Now, admitting this was strictly a lease, there is an error in supposing that the city could only enforce a forfeiture of it by the course of the common law. The city, in leasing her commons, did not act of her mere volition as an individual proprietor would in leasing lands belonging to him. She acted under a law of the state, and that law expressly empowered her to enforce the performance of the conditions of the lease by means of a forfeiture. The case is as though the general assembly had declared that the lease should be forfeited in the event of non-payment of the interest on the purchase money. There is a marked difference between a forfeiture imposed by a statute and one arising under the contract of the parties. The legislature can impose it as a punishment, whilst individuals can only make it a matter of contract. In the one case it can not be relieved against, in the other it may. In the one case it may be taken advantage of in the manner prescribed by the law imposing it, in the other only according to the course of the common law. (How. 3 U. S. Rep. 534.)

The right to enforce a forfeiture or annulment of the lease being conferred by an act of the general assembly, which can not be relieved against, it remains to be inquired into, whether the appropriate steps were taken by the city authorities to carry it into effect. Whilst courts will not incline to forfeitures, yet when a right to exact forfeiture is given, they should not withhold a reasonable construction from the written instruments by which they are designed to be enforced. Taken in connection with the facts, it is impossible to place any other interpretation on ordinance 766 than that which will make it effectual for the purpose for which it was intended. The objections to the ordinance are verbal. There is no force in them. No one can read the ordinance in connection with the deed or conveyance and entertain any doubt as to its meaning. The right reserved

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in the deed is to *annul* the sale. The ordinance declares it *forfeited* for the non-performance of the very act, for the non-performance of which it may be annulled. It is not pretended that there was more than one deed or conveyance between the parties respecting this lot. "Annul" is not a technical word. There is nothing which prevents the idea conveyed by it from being expressed in equivalent words. The annulling of a lease is nothing more in effect than causing a forfeiture of it. The recital in the preamble to the ordinance, that the right of forfeiture is reserved to the city, can not affect its validity. It means nothing more than that the right of forfeiture is reserved for the benefit of the city. Besides, if this was an error, it could produce no harm. If the right of forfeiture was enforced by the authority empowered to do it, a mis-recital of the authority to whom it was reserved could work no wrong. There are several other criticisms on the language of the ordinance which we do not deem it necessary to notice.

The view we have taken of ordinance 766 relieves us of the necessity of saying any thing in relation to ordinance 2826, not intending thereby to detract any thing from the weight to which it is entitled.

The change of the name of a corporation does not affect its rights. In its new name, a corporation may proceed to enforce rights acquired under a former name, and the same remedy is open to those who had claims upon it before the change. A corporation which has been suspended by the loss of the governing members may be revived by a name different from that by which it was formerly known, still preserving its identity and ancient rights. (Willook, 36.)

The act of 18th March, 1835, under which the sale or lease was made, took effect on the 1st December, 1835. On the 26th February, 1835, an act was passed conferring a new charter on the city by the name and style of the "mayor, aldermen and citizens of the city of St. Louis." This act, too, it would seem, took effect on the first December, 1835. The name of the incorporation given by this act is the same by which the

city stood incorporated before its passage. By an act approved February 8th, 1839, the city received a charter by which she was incorporated under the name and style of "the city of St. Louis." This act changed the former charters and vested the legislative power in a city council, consisting of a board of aldermen and a board of delegates. Ordinance 766 was passed under this last charter, and it purports to have been passed by the city council. Now, it is maintained that, inasmuch as the deed requires that the act of annulment should be made by the mayor and aldermen, the ordinance or resolution made by the city council, declaring a forfeiture, is ineffectual for that purpose. The act under which the commons were sold or leased, directed that the deed should contain a condition to the effect that if the interest on the purchase money remained unpaid for six months, the *board* might, by resolution to be entered of record on the minutes of their proceedings, annul the sale of any lot which was delinquent. This is the act. Its meaning and purpose are obvious. That meaning was not changed by transferring the words of the law into the contract. The idea intended was that the body in which the legislative power of the city resided should annul the sale. It never was contemplated that the organization of the legislative power of the corporation should forever remain unchanged, in order that advantage might be taken of the condition. Suppose that after all legislative power had been taken by charter from the board and vested in another body, and the charter had provided that two men should be a board of aldermen, with no legislative powers or duties whatever, would the annulment of the sale by such a board be within the spirit or meaning of the condition? The concurrence of the mayor in the act, if it were conceded that his consent was not required, can not prejudice the vendee or lessee. As his action is separate and independent of the board, the requiring of his concurrence is an advantage to the vendee of which he can not complain. To obtain the joint concurrence of two separate bodies to an act, is more difficult than to obtain the consent of one of those bodies; besides, if the resolution,

without his approval, was sufficient, the putting his signature to it could not affect its validity.

What has been said in relation to the change of names of corporations, is an answer to the objection that, in the new charter of 1839, under which ordinance 766 was passed, there was no reservation of the power to annul the sales made by the mayor and aldermen. In addition to this, the seventh and eighth sections of the seventh article of the charter of 1839 are sufficient to preserve all rights belonging to the city under former charters.

Another point made by the appellants was, that the annulment of the sale to Atwood did not revest a fee simple in the lot in the city of St. Louis; that such an effect could not be produced unless the city had been the owner before the annulment. The case of *Swartz v. Page*, (13 Mo. 610,) certainly goes on the idea that the city had power to convey a fee simple title to the commons. In the case of *DuBois v. Bramell*, (4 How. U. S. Rep. 458,) the court says: "In January, 1831, the city of St. Louis and other towns applied to have their rights of common further confirmed and regulated, and an act of congress was passed declaring that the United States do hereby relinquish to the inhabitants of the several towns of St. Louis, &c., all right, title and interest in and to the town or village lots, out-lots, common-field lots and commons, to be held by the inhabitants of the said towns in 'full property,' and to be regulated or disposed of for the use of the inhabitants according to the laws of the state of Missouri. This law vested in the city corporation the town common in fee simple, and gave full power to the legislature of Missouri to incorporate it into the city by extending the city charter over it." The right of congress to pass any law affecting the right to commons, after the act of 1812, has been questioned; but this exercise of power has its foundation, it is presumed, in the nature of commons. The right to commons in the inhabitants was not inconsistent with the idea of a fee in the sovereignty under which they existed. The words "in full property," in

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the act above cited, seem to show that such was the opinion entertained by its authors. The act of 18th March, 1835, was passed in pursuance to this act of congress by the legislature of Missouri, to enable the city to dispose of her commons.

There was an admission in the answer that the lot was cultivated, and that one of the defendants lived upon it. Under these circumstances, the amount of the damages was exclusively for the jury.

Judgment affirmed, the other judges concurring.

PENSENNEAU, Respondent, *vs.* PENSENNEAU *et al.*, Appellants.

1. A. B. and C. (A. and B. having husbands living) owning land in co parcenary, an amicable partition is made and equal shares allotted to each; in making the mutual conveyances to complete and perfect the partition, B. and husband and C. convey to A.'s husband instead of to A. herself; and the deeds of A. and her husband to B.'s husband and to C. are so acknowledged as to pass only the life interest of the husband: *held*, in a suit by A. against the heirs of her deceased husband, that there is no equity in her favor to obtain a divestiture of the title that descended to the defendants from the husband of plaintiff.
2. *Semle*: That lands acquired in this state in exchange for land in the state of Illinois, clothed with a trust in the latter state, will be held subject to the same trust; but the question whether the land in Illinois is held subject to a trust must be determined by the law of Illinois.
3. Where a suit is brought to enforce a trust, with reference to specific property, and the plaintiff prays a divestiture of title; and also prays that, if the court should refuse the first prayer, the rights of plaintiff and also of defendants may be ascertained and a partition and division decreed accordingly: *held*, that the alternative relief prayed is founded on the assumption that the cause of action is wholly misconceived, and should not be granted. A plaintiff cannot ask in his petition, that, if he should have mistaken his remedy, and should fail to obtain the relief prayed, another and a different cause of action may be tried.

Appeal from St. Louis Circuit Court.

This was an action, in the nature of suit in chancery, brought by the plaintiff, Elizabeth Pensenneau, widow of Laurent Pensenneau, against defendants, the heirs at law of said Laurent,

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to establish and set up a trust as against the said defendants. The facts as found by the court, and as they appear from the admissions of parties, are as follows :

In the year 1835, one John Hays died seized of the north-west quarter of block No. 78 in the city of St. Louis, and of a tract of land in St. Clair county, Illinois, as shown by the following diagrams :

*Block No. 78.**Illinois Land.*

Poplar Street.				
Fourth Street.	E. P. No. 1.			
	J. McK. No. 1. C. C. No. 1.			
	E. P. No. 2.			
			Third Street.	
				E. P., No. 3.
				J. McK., No. 2.
				C. C., No. 2.

Hays left three daughters, his only heirs at law, viz : the plaintiff, Elizabeth Pensenneau, then wife of Laurent Pensenneau ; Catherine, then wife of Edward Caya, and Jane McKenney, a widow. In the year 1839, an amicable partition and division of the said tracts was made by the plaintiff, and her husband, Laurent Pensenneau, the said Catherine Caya and her husband, Edward, and the said Jane McKenney, as follows : for the plaintiff's share they allotted the lots marked upon the above diagrams, E. P., No. 1, E. P., No. 2, and E. P., No. 3 ; for Jane McKenney's share they allotted the

lots marked on the above diagrams, J. McK., No. 1, and J. McK., No. 2; for Catherine Caya's share they allotted the lots marked C. C., No. 1, and C. C., No. 2. On the 9th day of July, in the said year 1839, the plaintiff and her husband, Laurent Pensenneau, the said Catherine Caya and her husband, Edward Caya, and the said Jane McKenney, with a view to complete and perfect the said partition, executed to each other mutual conveyances, according to the allotments above stated; but in conveying the share which had been allotted to plaintiff, the said Catherine Caya and husband, and the said Jane McKenney, made their conveyances to the said Laurent Pensenneau, instead of to plaintiff; so also the said Elizabeth and her husband, and the said Jane McKenney, in conveying the share which had been allotted to Catherine Caya, conveyed the same to her husband, Edward. The deeds executed by Pensenneau and wife to E. Caya, and to Jane McKenney, and also the deeds executed by the said Caya and wife to the said Laurent Pensenneau and the said Jane McKenney, were not acknowledged so as to pass the interest of the wives, Elizabeth and Catherine, in the lots in block No. 78, but were duly acknowledged so as to pass the Illinois land.

On the 15th day of April, 1840, the said Laurent Pensenneau and Elizabeth Pensenneau, his wife, conveyed to Jane McKenney the lot situated in block 78, and marked upon the above diagram E. P., No. 2, in consideration of a conveyance executed the same day by the said Jane to the said Laurent, of her portion of the Illinois land, to-wit: that marked J. McK., No. 2, on the above diagram.

On the 16th day of September, 1842, the said Catherine Caya and her husband, Edward Caya, conveyed to said Laurent Pensenneau the lot in block 78, marked upon the above diagram C. C., No. 1, which had, in making partition, been allotted for part of said Catherine's share, in consideration of a conveyance executed on the 14th of the same month by plaintiff and her husband to said Edward Caya, of the two parcels of land marked upon the above diagram E. P., No. 3, and J.

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McK., No. 2. It is further found by the court that the plaintiff is illiterate, being unable to read or to write, and that the partition deeds above mentioned were drawn and executed under the direction of the said Laurent Pensenneau and Edward Caya; that the said Laurent died July 18, 1848, leaving the defendants his heirs at law; that said Laurent, in his lifetime, expended the sum of \$1000 in improvements upon the lots in controversy in the present suit. In the year 1848, after the death of said Laurent Pensenneau, Edward Caya and Catherine, his wife, conveyed to plaintiff all their interest in the lots in block 78, marked upon the above diagram E. P., No. 1, and C. C., No. 1. The plaintiff prays that the title of defendants to the lots in block 78, marked upon the above diagram E. P., No. 1, and C. C., No. 1, acquired by descent from Laurent Pensenneau, be divested out of them and vested in the plaintiff. The petition contains the further prayers: "or that the same decree may be made as to so much of the said interest and estate as she may be entitled to; but, if the court shall be of opinion, and shall decide upon the trial or hearing of this cause, that plaintiff is not entitled to the relief above prayed in equity and in conscience, the plaintiff prays that her rights and the rights of the defendants in the said lots of ground may be ascertained, and a partition and division of the same decreed accordingly. Plaintiff claiming and insisting that she is entitled to the whole of the two lots last above described, is yet desirous that the defendants, if the court shall adjudge they have any equitable and just title thereto, may have their interest ascertained and set off to them, and plaintiff avers that she is entitled to the following interest in the said lots at all events: First, as to the lot at the corner of Fourth and Poplar streets, she is entitled to one-third in fee as one of the heirs at law of John Hays, deceased; second, she is entitled to the interest of the said Catherine Caya as one of the heirs of said Hays, because the said interest was not conveyed by the deed of July 9, 1839, to said Laurent Pensenneau, but was conveyed to plaintiff by said Catherine Caya and husband, after the death of

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said Pensenneau ; and, third, that as widow of said Laurent Pensenneau, she is entitled to one half of the residue as her dower, she being entitled by law to take by election one half of the real estate of her said husband as dower. Secondly, as to the lot fronting on Poplar street, (that marked in diagram C. C., No. 1,) plaintiff is entitled to as follows : First, one third thereof as one of the heirs of said Hays, the deed to Edward Caya being inoperative and void as to her, and not conveying her third to said Caya ; second, she is entitled to the interest of said Catherine Caya as one of the heirs of said Hays, the said interest not having been conveyed to said Laurent by said deed No. 3, because the same is inoperative to convey it, but the said interest is vested in plaintiff by deed B, No. 4 ; and, third, she is entitled to one half of the residue as dower by her election as above stated."

The court decreed that the lots marked E. P., No. 1, and C. C., No. 1, be divested out of the defendants and vested in the plaintiff ; whereupon the defendant appealed to this court.

Krum & Harding, for appellant. 1. The respondent's petition contains no case for relief ; taking its allegations to be true, Jane McKenney is the person entitled to such relief. 2. The respondent failed to show an implied or resulting trust. No declaration of respondent's husband was shown to the effect that such a trust existed. No consideration moved from the respondent in the conveyances made by Laurent Pensenneau, nor was any portion of the purchase money named in the deed ever paid by her. The conveyance to Laurent Pensenneau was made for a good and valid consideration, moving from him, to-wit, his conveyance of his interest in his wife's estate.

S. Reber, for respondent. 1. The only question that arises as to the lot at the corner of Fourth and Poplar streets, (marked E. P., No. 1,) is, whether the deed executed to make and consummate a partition of the wife's property, though executed to the husband, enured to the benefit of the wife. The consideration moved from her and there is a resulting trust in her favor. The object was not to acquire land for the husband,

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but to make partition of the land of which the wife and her sisters were owners. (*Weeks v. Haas*, 3 W. & S. 520; 4 Grattan; 2 Ves. 488; *Trustees of M. E. Church v. Jacques*, 1 Johns. Ch. 450, 437.) 2. As to the lot marked on diagram C. C., No. 1, two questions arise. The first is the same as that just stated; the second is whether when trust property is exchanged for or converted into other property, such other property is also clothed with a trust. That it is, see 2 Sto. Eq. p. 443, and cases cited above; also *Malin v. Malin*, 1 Wend. 625, 680-1. 3. The evidence offered to show the consideration of the conveyances was properly admitted. (16 Wend. 465; 14 Mo. 580; 17 Mo. 58; 1 John. Ch. 582; 2 id. 405.) 4. It is contended on the other side that some of the partition deeds are defectively executed; that by reason of these defects, the interests of the wives did not pass; that Laurent Pensenneau and wife, by their deeds to Edward Caya and Jane McKenney, only passed the interest of Laurent Pensenneau, and that consequently no part of the consideration for the conveyances to Laurent Pensenneau moved from his wife, the present plaintiff. To this it is answered that the deeds of the Illinois land were executed in due form, so as to pass all the interest of Laurent Pensenneau and wife; that this is a case of partition—the parties divided and allotted the land and held it in severalty, and although they failed to execute the deeds, so as to fully carry out their intention, the quality and effect of what was well done were not changed on account of the failure to do every thing well. If Laurent Pensenneau would have taken the land subject to a trust in favor of his wife, if the deeds had all been duly executed, he could not claim that he was a purchaser, because they were not executed. The partition might have been by parol. (Co. Litt. p. 169; 25 Wend. 436.) A married woman may avoid an unequal partition when she becomes discoverer; but if she acquiesces after her coverture ceases, she will be bound by it. (Co. Litt. 170.) Plaintiff does not seek to disturb the partition; she could not do it if she would, having acted upon and acquiesced in it. It can make

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no difference to Mrs. McKenney, whether the title she conveyed to L. Pensenneau is in him or in the plaintiffs. But the interest actually conveyed to Mrs. McKenney was the property of the plaintiff; held by her husband, it is true, in right of their marriage, but still it was hers. If Mrs. McKenney did not get all that was intended by the deed of L. Pensenneau and wife, what she did get was at least part of the interest of one of the co-parceners, and it was in consideration of that interest (which she supposed to be larger) that she conveyed one-third in fee to that co-parcener's husband, not as purchaser, but to make partition. It does not lie in the mouth of L. Pensenneau or his heirs, to say that Mrs. McKenney never received the whole consideration for which she conveyed an interest to him. If Mrs. McKenney is satisfied, shall Pensenneau or his heirs complain for her? They are strangers, and can not assert her rights. (*Guest v. Farley*, 19 Mo. 151.) The plaintiff, by seeking to obtain the land conveyed by Mrs. McKenney, confirms the other part to her.

SCOTT, Judge, delivered the opinion of the court.

Elizabeth Pensenneau, the plaintiff, claims that a trust results to her in the land in controversy, because it was an inheritance derived from her father; and her husband, in making a partition with her co-heirs, took a deed for her share in his own name, by which he clothed himself with a trust as to it; and now that he is dead, that she is entitled to have it executed by a conveyance to her of the title in fee simple.

If it were conceded that the law is as assumed by the plaintiff in relation to a resulting trust in her favor, yet a difficulty arises from the fact that the deed in which she joined with her husband in making partition with her co-heirs, was not executed by her in such a way as to pass her interest in the inheritance derived from her father, so that she is now in the same situation she would have been had no partition been made. Her

husband had a life estate in her land, and, as the matter stands, that estate was the sole consideration which was given for the land, which he acquired by the partition among the co-heirs of his wife, the plaintiff. Elizabeth Pensenneau, the complainant, not having acknowledged the deed in such manner as to pass the estate she had in the land, she now stands as though the partition had not been made, and is at liberty to assert her rights, freed from all embarrassments, so far as appears from the record, created by her husband's deed to her co-heirs.

The foregoing observations apply to the lot situated in St. Louis. As to the tract of land lying in the state of Illinois, the deed of partition was effectual to convey all the estate owned there by the plaintiff. In the partition made in Illinois, the husband of the plaintiff took the conveyance in his own name, and the portion thus acquired he conveyed as part of the consideration for the lot originally assigned to Caya and wife in the partition made of the inheritance situated in St. Louis. Now, if, in making a partition of lands in Illinois, belonging to the wife, as a co-parcener, the deed should be taken in the name of her husband, whether a trust results to the wife is a question to be settled by the laws of that state. If it should be found that the husband in such case would hold as a trustee for his wife, then the question arises whether lands here acquired by an exchange or sale of land in Illinois will be impressed with the trust with which it was clothed in that state. According to the views heretofore entertained by this court, it would seem that lands thus acquired would be held subject to the trust with which the land was clothed, for which they are exchanged or sold. (*Depas v. Mays and wife*, 11 Mo. 317.) The question arising under the partition made in Illinois, by reason of the husband taking the deed in his own name, has not been discussed in reference to the laws of that state, and we are unwilling to hazard an opinion in reference to it, especially as it is not necessary in the aspect which the case now assumes.

We are embarrassed in relation to that part of the petition

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which asks for a partition of the premises as alternative relief to that sought by the case as stated. We do not know on what principle it is founded. Is it to be sustained by the provision contained in the third section of the 17th article of the present practice act, which says: "The court may grant any relief consistent with the case made by the complainant, and embraced within the issue?" What is the meaning of this provision? Can it be that the plaintiff may, in his petition, ask that, if he fails to make out his case, as stated, that then the court may from the facts, as they turn out, try another and a different action, and give the party the alternative relief sought? Can a plaintiff say the facts of his case are one way, and ask the relief to which they entitle him, and then require the court, if he should on the trial fail to prove his case, to try another cause of action, and ascertain whether he is not entitled to other relief? Here is a petition to enforce a trust. The facts are stated with an eye to that relief. Now, on what principle can the plaintiff ask that, if he is mistaken in the facts, as stated, that then his case may be turned into a petition for partition. The plaintiff must ascertain the facts of his case before he brings his suit. He must state them in a way to entitle him to the relief he seeks. If, on the trial, it turns out that he was mistaken as to the facts of his case, the third section of the 11th article of the practice act affords him a remedy. We understand the clause above cited to mean, that, if on the facts as stated, the plaintiff is entitled to relief of two or more kinds, and he asks for only one kind, yet failing to obtain that, he may have any other relief to which his case, as made, entitles him. He can not ask in his petition that, if he should be mistaken as to its remedy and fails to obtain the relief he seeks, then that another and a different cause of action may be tried. For the purposes of his action, he must assume that the facts are one way and asks the appropriate relief. He must rely on the facts as stated; if he is mistaken, then the third section of the 11th article of the practice act prescribes a remedy which he

must ask from the court, and not come here and object for the first time that it was not allowed him. (*Robinson v. Rice*, 20 Mo. 229.)

The alternative relief here sought is founded on the assumption that the cause of action is wholly misconceived, and is entirely inconsistent with and foreign to the case as stated in the petition. Moreover, the necessary parties were not before the court in order to make a partition of the premises.

The difficulty in this case grows out of the omission or unwillingness of the plaintiff to determine on what grounds she will stand. She must either abide by the partition or disclaim it. If she insists that there was a binding partition, let her make a deed confirming it, the only effectual mode by which it can be done. Then she will be in a position to claim an enforcement of the trust, if there is any. If she is unwilling to do this, then let her declare the nullity of the deed of partition, growing out of the imperfect mode of executing it. Failing to do one or the other of these things, she will not be permitted to litigate her rights, without determining what they are, before she institutes her suit. The judgment is reversed, and the bill dismissed without prejudice.

REAUME *et al.*, vs. CHAMBERS *et al.*

1. The estate of tenancy by the curtesy is coeval in existence in this state with dower. It was introduced by the territorial act of July 4th, 1807.
2. Where a tenant by the curtesy makes a conveyance, that would, if he were seized in fee, give the grantee an estate for his (grantee's) life, *held*, that the grantee takes an estate for the life of the grantor.
3. Where a tenant by the curtesy executes a conveyance which operates to transfer an estate for the life of such grantor, *held*, that so long as this estate is outstanding, it prevents a recovery of the land by those claiming under the wife of such tenant by the curtesy.
4. *Lindell v. McNatr*, (4 Mo. 380,) explained and affirmed. The case of *Lindell v. McNatr* merely decided that a conveyance, executed by husband and wife, after January 19, 1816, (the date of the introduction of the common

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- law) and before June 22, 1821, (the date of the "act to enable husband and wife to convey real estate belonging to the wife,") in conformity to the statute law then in force, regulating conveyances and the relinquishment of dower interests, was effectual to convey real estate belonging to the wife. After the introduction of the common law, the Spanish law had no force here.
5. In order that a deed of a married woman may effectually convey her estate, the requirements of the law must be complied with. If it appear from the face of the deed that the deed has not been executed in the manner required by law, there can be no presumption of its proper execution as against her.
 6. A deed executed November 16, 1819, in Illinois, by husband and wife, and acknowledged before a notary public there, is ineffectual to convey the wife's real estate in Missouri.
 7. Where a deed, wanting words of perpetuity, is written on the back of another deed conveying an estate in fee, and contains the following clause—"have sold, ceded, released, and transferred all their part of the land sold by their co-heirs in the sale above;" *held*, that this reference is not of such a character as to enlarge the life estate conveyed to a fee simple.
 8. Actual seizin of the wife's land is not necessary to entitle the husband to curtes.
 9. A right of entry or of action for the possession of land may accrue to a married woman. A married woman having a right of entry which accrued before December 1st, 1835, may bring her action within twenty years after becoming discovert.

Writ of Error to St. Louis Circuit Court.

This was an action in the nature of an action of ejectment, brought by Paul Reaume and others, to recover possession of one-fifteenth part of certain premises in the possession of defendants. The premises claimed are a portion of a lot of one by forty arpens, situate in the St. Louis or Big Mound prairie, in the city of St. Louis, and confirmed by act of congress to the representatives of Francis Moreau. Both plaintiffs and defendants claim under representatives of the said Francis Moreau. The plaintiffs claim immediately and directly through their mother, Marcelite Reaume, wife of Pierre Reaume, one-eighteenth part of the piece of ground in controversy in the present suit, and one-ninetieth part of the same through their great-aunt, Marie Collin, the daughter of the said Francis Mo-

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reau. The defendants claim title as stated below in the stated case which follows, and which fully sets forth the facts of the case :

"The facts in this case were agreed ; both parties excepted to the decision of the court, and the following case is agreed upon, and that the above cause be open to objections by either party ; that the opinion of the Supreme Court may be had on the several points made respectively by the parties, and essential to the legal adjustment of their rights.

"The plaintiffs are children of Pierre Reaume and Marcelite his wife. The said Marcelite was the daughter of Louise Moreau, who was the daughter of François Moreau and wife of Joseph Menard. Louise, wife of said Menard, died before 1818, and left surviving her three children, one of whom was said Marcelite, married to Pierre Reaume in 1815, and died in 1834, leaving the plaintiffs, her children and heirs at law, and her husband, who is yet living, surviving her. The plaintiffs are aged as follows : Odille, aged 37 years in November, 1852, and married at 18 years of age ; Paul Reaume, aged at same time 33 years of age ; Augustus, aged 31 years ; Leonard, 29 years ; François, aged 24 years. Both parties claim under representatives of François Moreau, who died before 1800, leaving seven children, viz : Joseph, Alexis, Louis, Angelique (married to Antoine Mallet), Ellen (married to Pierre Céné), Louise (married to Joseph Menard), Marie, called also Manette (married to Louis Colin). Of these children, Louis, forty years before the trial, died intestate and without issue ; Louis Colin, husband of Marie, *died in March*, 1840, intestate and without issue ; his wife died in November, 1840, intestate and without issue : they were married prior to 1818. The remaining children of François Moreau left lineal descendants."

The defendants claim title under the deed of which the following is a copy, and also a copy of deed from P. Reaume and wife, endorsed on said original deed, the whole being on one

paper. The original may be shown to the court, as it was to the Court of Common Pleas :

“ Sachent tous ceux qui ces présentes verront, que nous soussignés, Joseph Hortiz et Eleonore mon épouse, Joseph Menard et Aurore Crely mon épouse, Pierre Céné et Helen Moreau mon épouse, Antoine Mallet et Angélique Moreau mon épouse, Manette Moreau, Joseph Moreau, Alexis Moreau, et Ositte mon épouse, tous héritiers de François Moreau, décédé, pour et en considération d'une somme d'argent qui nous a été il y a quelque tems payé à notre pleine et entière satisfaction par Mr. Pierre Chouteau, senior, et aussi pour la somme d'une piastre, argent légal des Etats Unis, qui nous a été payée à chacun de nous avant la signature de ces présentes, et dont par ces présentes nous donnons pleine et entière quittance au dit Pierre Chouteau, et le déchargeons, lui, ses héritiers, hoirs ou ayant cause, nous avons vendu, cédé, quitté, delaissé, abandonné et transporté, comme de fait et par ces présentes nous vendons, cedons, quittons, delaissons, abandonnons et transportons au dit Pierre Chouteau, senior, ses héritiers, hoirs ou ayant cause, tous et chacun de nos droits, titres, actions et prétentions quelque elles puissent être tant en loi comme en cour d'équité, que nous ou l'un de nous pouvons avoir, ou peut-avoir, a un certain morceau de terre, situé au nord de la ville de St. Louis, dans le territoire du Missouri ; le dit morceau de terre contenant un arpent de front sur quarante arpens en profondeur, le front borné et déterminé par la ligne ou trait quarré de toutes les terres situées sur la même ligne de front, au sud par la terre concédée à Lirette, au nord par une terre concédée à Vien et aujourd' hui la propriété du dit Pierre Chouteau, et à l'ouest par les terres vacantes. Garantissant la dite terre libre de tous dons, dettes, douaires au hypothèque ; et la garantissant chacun de nous en particuliers et avec notre épouse, contre nos héritiers ou ayant cause tant en loi comme en cour d'équité. En foi de quoi, nous les parties ci-devant designées, avons signé et scellé le present, à St. Louis, le 3 Septembre de l' année mil huit cent dix-huit.

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“Les mots, *avant la signature de ces présentes*, approuvés et interlinés à la première page. (a)

sa
“ANTOINE × MALLET, (L. S.)
marque.

“MARIE COLLIN, (L. S.)

his
“JOSEPH × MENARD, (L. S.)
mark.

sa
“JOSEPH × MOREAU, (L. S.)
marque.

“ALEXIS MOREAU, (L. S.)

sa
“OSITTE × ST. ANDRE, femme (L. S.)
marque. d'ALEXIS MOREAU,

her
“ANGELIQUE × MOREAU, (L. S.)
mark.

his
“JOSEPH × ORTEAST, (L. S.)
mark.

her
“ORO × MENARD, (L. S.)
mark.

her
“LENOR × ORTEAST, (L. S.)
mark.

his
“PIERRE × CENE, (L. S.)
mark.

her
“ELLEN × MOREAU, (L. S.)
mark.

“Signé et scellé en presence de—”

(a) This deed is correctly translated as follows: “Know all those who shall see these presents, that we, the undersigned, Joseph Hortiz and Ellenore, my wife; Joseph Menard and Aurore Crely, my wife; Pierre Cene and Helen Moreau, my wife; Antoine Mallet and Angelique Moreau, my wife; Manette Moreau, Joseph Moreau, Alexis Moreau, and Ositte,

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"State or territory of Missouri, county of St. Louis. Personally came and appeared before me, the undersigned, a justice of the peace for the county aforesaid, Joseph Menard, Joseph Orteast, and Oro Menard and Leonor Orteast, who in my presence signed the within instrument of writing, and at the same time acknowledged it to be their and each of their hands and seals, acts and deeds, for the purpose therein contained, and that they executed the same of their own free and voluntary will.

"In witness whereof, I have hereunto set my hand, at my office, this ninth day of November, in the year of our Lord one thousand eight hundred and twenty.

"THOMAS R. MUSIC, J. P."

"Sachent tous ceux qui les presentes voiront, que Pierre Reaume, a cause de Marceline son épouse, fille et héritière de Joseph Menard et Marie Louise Moreau, pour la considération de la somme de vingt piastres qu'il reconnoissent avoir reçu comptant du Sieur Pierre Chouteau, Sen^{er} de St. Louis, lui ont

my wife; all heirs of Francis Moreau, deceased, for and in consideration of a sum of money, which was paid to us sometime ago, to our full and entire satisfaction, by Mr. Pierre Chouteau, sr.; and also for the sum of one dollar, lawful money of the United States, which has been paid to each of us, before the signing of these presents; and of which we do, by these presents, give to the said Pierre Chouteau, his heirs and assigns, full and complete acquittance and discharge; we have sold, granted, quit claimed, remised, made over, and conveyed, as in fact, and by these presents we do sell, grant, quit claim, remise, make over, and convey to the said Pierre Chouteau, sr., his heirs and assigns, all and each of our rights, titles, actions and claims, whatever they may be, which we or each of us has or can have, both in law or in a court of equity, to a certain parcel of land, situated north of the village of St. Louis, in the territory of St. Louis; the said parcel of land containing one arpent in front by forty arpens in depth; the front bounded and limited by the line, or '*trait quarre*' of all the lots situated on the same front line; on the south by land conceded to Lirette; on the north, by a lot conceded to Vien, and to day, the property of said Pierre Chouteau; and on the west, by vacant lands; guaranteeing the said lands free from all gifts, debts, liabilities, or incumbrances; and each one of us, with our wives, guaranteeing it individually against our heirs or assigns, as well in law as in a court of equity. In testimony of which, we, the parties hereinbefore named, have signed and sealed the present, at St. Louis, this 3d day of September, of the year eighteen hundred and eighteen."

The words "before the signing of these presents," approved and interlined on the first page. Signed and sealed in the presence of.

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vendu, cédé, quitté et transporté toute leur part de la terre vendue par leur cohéritiers dans la vente cidessus. En temoignage de quoi, ils ont signés et scélé ce sixième jour du mois de Novembre, l'an mil huit cent dix-neuf—en presence des temoins, soussignés.

ss
 “ PIERRE × REAUME, (seal.)
 marque.

ss
 “ MARCELINE × REAUME, (seal.)
 marque.

“ RAPHAEL WIDEN, }
 “ PIERRE MENARD.” }

“ State of Illinois, Randolph county, ss. Be it remembered that before me, Raphael Widen, notary public for the county of Randolph, personally came the within named Pierre Reaume and Marceline his wife, who severally acknowledged and declared that the foregoing sale for their respective part of a tract of land in the within deed described, from them to Pierre Chouteau, senr., was their voluntary act and deed, for the purposes therein expressed.

“ In testimony whereof, I, Raphael Widen, have hereunto set my hand and affixed the seal of my office, this 6th (Seal.) day of November, A. D. one thousand eight hundred and nineteen, and of the independence of the United States the forty-fourth.

“ RAPHAEL WIDEN, N. P.

“ Filed for record, June 6th, 1822.

“ A. GAMBLE, Clerk.”

“ Pierre Chouteau, the grantee in said deed, conveyed to John Mullanphy, by deed bearing date the 30th day of October, 1819. The defendants have all the title of said John Mullanphy in the premises in question. In relation to the deed from Antoine Mallet and others to Pierre Chouteau, the following facts were admitted: That it was written by François M. Guyol, who, at the date thereof, resided in St. Louis, and was a justice of the peace, and did the business of conveyancing for some of

the then inhabitants of St. Louis. He was a Frenchman, and went from St. Louis to New Orleans to reside, in 1820, and died there about 1847 or 1848. The signatures, Antoine Mallet, Angelique Moreau, Joseph Moreau, Ositte St. André and Pierre Céné, were also in the handwriting of Guyol. The words '*sa marque*' are also in the handwriting of Guyol, where he wrote the names; that the name of Ellen Moreau is in the handwriting of E. H. Hawley, who was formerly a justice of the peace in Florissant, but not acting at the date of the supposed deed. The interlineation is in Guyol's handwriting, and the note of it at the bottom of the instrument, as also are the words, 'signed, sealed,' &c., at the bottom. Alexis Moreau, Joseph Moreau and Ositte St. André, admitted their signatures to the instrument, in the fall of 1818. About thirty-two years before the trial, Mallet and Céné, who then resided at Florissant, at one time returned from St. Louis with goods in a cart; about that time or soon after they said they had sold their land in St. Louis to Mr. Chouteau. Their wives went with them to St. Louis at the same time, and returned with them. Neither of the wives said any thing about the sale, nor is there any evidence that it was spoken of in their presence. The signature of Marie Collin to said instrument is in the handwriting of her husband, Louis Collin. The deed from Reaume and wife, in the same paper, is in the handwriting of Raphael Widen, and his name subscribed thereto as a witness, is in his handwriting. The name of Pierre Menard, a subscribing witness thereto, is the proper handwriting of said Pierre Menard, and the certificate of acknowledgment thereon is in the proper handwriting of said Widen. Said Widen and Menard are both dead, and died before the commencement of this suit. The certificate and signature of Thomas R. Music on said instrument are in his handwriting, and he was at the date thereof an acting justice of the peace. The signatures of Joseph Menard and Joseph Orteast, and Oro Menard and Eleanor Orteast, are in the handwriting of said Thomas R. Music, who died more than ten years since. Joseph Menard and Eleanor Or-

teast were children of Louis Menard, before mentioned. The endorsement on the deed, 'heirs of Moreau to Chouteau,' is in Guyol's handwriting. The words on the instrument, 'for Mr. Mullanphy,' are in the handwriting of E. Baker, who was clerk in the recorder's office of St. Louis county, at the record of said instrument. When a deed was left at that date, it was usual to make endorsement of the name of the person to whom to deliver it. The words, 'for Mr. Mullanphy,' would indicate, according to the then practice in the recorder's office, that Mr. Mullanphy left the instrument for record. It was recorded in June, 1822.

"It is also admitted that John O'Fallon was executor of the estate of John Mullanphy, who died in August, 1833; that said executor found said deed amongst the deeds and papers of said Mullanphy, after his death, in a trunk, where such papers were deposited; that it has been since in the custody of said executor and the heirs of said Mullanphy, and was produced on the trial by the defendant from such custody—the wife of Charles Chambers being a daughter of said John Mullanphy.

"It was also admitted that John Mullanphy, under the deeds herein mentioned, took possession of the land in controversy in the spring or summer of 1820, and built a house thereon in the fall of 1820, and held possession until his death in 1833; that the defendants claim under said John Mullanphy, and have his title, and have been in possession of said premises since the death of said John Mullanphy, claiming title thereto. Pierre Chouteau died in 1849. Pierre Reaume and wife were never actually in possession, occupying themselves the land in controversy. It was a field lot, which had been occupied by Francis Moreau prior to his death, which was in 1798, and was not held adversely by any one at the date of the deed from Pierre Reaume and wife to Pierre Chouteau, sr.

"The defendants, upon the facts as admitted, read the several deeds in evidence, and claimed that the deed to Pierre Chouteau from Antoine Mallet and others was duly executed. The plaintiffs claimed 1-15th of the premises in question under

the evidence. The damages and monthly value were agreed upon, and the Court of Common Pleas gave judgment for the plaintiffs for an undivided ninetieth part of the premises in question.

"The plaintiffs and defendants both filed motions for review, which were overruled, and both bring the cause to this court by writs of error. The plaintiffs claiming 1-15th of the premises, and defendants claiming a judgment in their favor.

"The suit was commenced in the Court of Common Pleas on the 7th of July, 1851.

"The land included in the deed to Pierre Chouteau, and conveyed by him to Mullanphy, was partitioned among the heirs of John Mullanphy, by petition of the heirs addressed to the Court of Common Pleas, which made an order to partition at the August term, 1841. The commissioners reported at May term, 1842, which was approved 14th May, 1842, and recorded 17th March, 1843, under which the heirs of Mullanphy now hold in severalty."

The case was submitted to the court sitting as a jury, upon an agreed statement of facts, and the court found that the plaintiffs were entitled to recover one-ninetieth of the premises sued for.

Williams and Glover & Richardson, for Reaume and others, plaintiffs in the court below, plaintiffs in error, and also defendants in error here. (a) 1. The main question involved in this cause springs up upon the construction of the instrument executed by Pierre Reaume and wife, as is set forth in the stated case, and of which the following is a correct translation: "Know all those who shall see these presents, that Pierre Reaume, for the sake of (*a cause de*) Marceline, his wife, daughter of Joseph Menard and Marie Louise Moreau, for the consideration of the sum of twenty piastres, which he acknowledged to have received, ready money, from Mr. Pierre

(a) Mr. Glover's brief is not to be found on file, and it is not attempted to set forth the line of argument pursued by him.—[*Ref.*

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Chouteau, senr., of St. Louis, to him have sold, made over, parted with and transferred all their part of the land sold by their co-heirs in the sale above. In witness," &c. At the date of this paper, (November 16, 1819,) the wife owned the fee in the land mentioned, by inheritance from her grandfather. She had never been in possession of the land, and at the date of this paper it was not in the possession of any one claiming adversely to her. What estate did this deed create in Chouteau? If the common law prevailed here at its date, then it certainly was insufficient to convey her real estate. It has been repeatedly decided by our Supreme Court that the act of 1816, introducing the common law, rendered it necessary that an instrument conveying land should have a seal, and required the word heirs therein to create a fee simple estate in the grantee. If the instrument executed by Pierre Reaume and wife be a deed at all, it was the deed of the wife, she being the main grantor, and containing no words of inheritance, could convey only a life estate to Chouteau, the grantee. 2. Pierre Reaume and wife were married prior to 1816, and curtesy was not introduced into this state prior to 1816. 3. The law of the place where land is situate, existing at the time of a marriage, governs the rights of the husband as to the estate then owned by the wife. (Sto. Confl. of Laws, § 187 n. 3; Riddick v. Walsh, 18 Mo. 520.) 4. If Pierre Reaume was tenant by the curtesy initiate, he had an estate for the life of the wife; this estate was separate from curtesy consummate, which did not exist until the death of the wife. (Watson v. Watson, 13 Conn. 83; Starr v. Pease, 8 Conn. 541; Wheeler v. Hotchkiss, 10 Conn. 230; 2 Binn. 80; 16 Mass. 188; 5 Dana, 257; 5 Cow. 102.) 5. The husband had a present estate that he could convey. If the deed passed that or could pass it, it will not be presumed to pass one that was contingent or to be hereafter acquired, unless there were some words of estoppel, &c. (McCorry v. King, 3 Humph. 267; see 8 Humph. 325.) 6. If Pierre Reaume was tenant for life, he could create an estate less than his own, and it is to be presumed that he intended doing so. (1 Cruise,

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§ 95.) An estate for a man's own life is higher than one for the life of another. (4 Kent, 26.) 7. If Reaume did convey to Chouteau an estate for his life, it merged into the larger estate in Chouteau; that is the estate for Chouteau's life. (4 Kent, 99-103.) 8. To give curtesy, there must have been possession of the land, at least such a seizin as would enable her children to inherit from her, &c. (4 Kent, 29-30; 2 Black. 312; 5 Cow. 74; 1 How. U. S. 87.) 9. No deed can be presumed against Mrs. Collin. 10. Under § 11, of art. 3, of the act of 1835, twenty years were allowed to Mrs. Collin, instead of ten. Her right of action accrued prior to 1835; indeed, prior to 1818, or 1825, and therefore the 11th section of the 2d article of the above act gave her twenty years in which to sue.

The court is also referred generally to the following cases: *Lindell v. McNair*, 4 Mo.; *Picotte v. Cooley*, 10 Mo. 312; *Childress v. Cutter*, 16 Mo. 24; *Norcum v. Youse*, 12 Mo. 588.

Haight and *Shepley*, for Chambers and others. 1. The deed from Pierre Reaume and wife, of the 16th of November, 1819, passed their interest in the premises to Pierre Chouteau. This conveyance is upon the same paper with the original deed. It is in French, and is correctly translated thus: "Know all those who shall see these presents, that Pierre Reaume, in right of (or together with) his wife Marceline, daughter and heiress of Joseph Menard and Marie Louise Moreau, for the consideration of the sum of twenty dollars, which they acknowledge to have received in cash from Mr. Pierre Chouteau, senr., of St. Louis, have sold, ceded, released and abandoned all interest in the land sold by their co-heirs by the above act of sale. In witness whereof, they have signed and sealed this 16th of November, 1819, in presence of the following witnesses." This deed was duly signed and sealed by Pierre Reaume and wife; and the only question of any difficulty upon it is, that it is to Pierre Chouteau, and the word heirs are not mentioned. Our answer to this is, it refers to the deed on the same paper, and

adopts, by necessary inference, the language of the conveyance. They sell all their part of the land sold by their co-heirs in the above or preceding sale. The just, fair and true interpretation of the language is, they sell as their co-heirs have sold, and adopt their deed. They sell all their part, or all their interest in the land above described, as sold by their co-heirs. The rules of interpretation upon such a deed of so ancient a date, should be liberal and not verbal. The intention of the parties should govern; and there is enough on the face of this instrument to justify the conclusion that they intended to convey, in as ample and full a manner, and as great an estate as their co-heirs had conveyed in the instrument on the same paper to which they refer; although the word heirs was in general necessary, after the introduction of the common law, to convey a fee simple, yet where the design was evident to convey a fee by reference to other deeds, or by the use of equivalent language, a fee passed. Thomas' Coke, p. (in brackets,) gives instances. (Hilliard on Real Property, p. 606.) The case put in Coke is where a grantee reconveys the lands "as fully as they were granted to him." (Lytle v. Lytle, 10 Watts, p. 260; Shep. Touch. 102; 4 Bing., N. C., 456; 11 Metc. 84.) No argument can be drawn from the phraseology of the deed. The persons conveying are evident from the use of the plural all through the deed. 2. As to the interest derived by the plaintiffs under their mother, it was subject to the life estate of the father; and as there is no dispute but he made a conveyance effectual to pass a life estate, it is good so long as he lived. On this point our position is: Pierre Reaume, at the date of his deed to P. Chouteau, was tenant by the curtesy initiate, and had an estate for his own life, which was effectually transferred by that deed. (5 Cow. 75; 1 Hilliard on Real Prop. 111.) Supposing that the deed of Pierre Reaume and wife passed only a life estate, it passed an estate for the life of the grantor. (4 Cow. 324; 1 Hill. 100, 101, 112, 116; 8 Johns. 262.) 3. The plaintiffs cannot recover any interest which Marie Collin had in said premises, and the court ought, upon the facts as

agreed on, to have found for defendants. The deed was properly in evidence before the court. A deed thirty years old, and possession under it for that period, and found in the proper custody, and not attended with any circumstances of suspicion, may be read in evidence as an ancient deed. (1 Grant on Ev. 638; *Wilson v. Betts*, 4 Denio, 201; 3 Johns. C. 283-286; *Carroll v. Hutchinson*, 1 Harr. & John. 167; 2 B. Monroe, 429; 5 Barr. 492.) These presumptions arise as well against married women as against others. (See *Bustod v. Gates*, 4 Dana, 441; 16 Pick. 137; 17 Pick. 255.) The deed was properly in evidence. We are now to consider its effect. Though not signed by the husband, the execution of the deed by Marie Collin was effectual to pass her title in the estates described in the deed. The cases decided by this court have already decided this question. They hold that a conveyance by a *feme covert* after 1816, and prior to 1821, is as effectual to pass her interest, if made with her husband's consent, as if she were a *feme sole*. (*Lindell v. McNair*, 4 Mo. 330; *Picott v. Cooley*, 10 Mo. 312; *Youse v. Norcum*, 12 Mo. 549.) They decide such conveyances to be effectual under the Spanish law; and in the absence of any provision for conveyances by married women, the same mode of transfer remains. As to power under the Spanish law of a *feme covert* to pass her paraphernal property, see 1 White's Collection, marginal pages, 53, 54; Brown's Civil and Admr. Law, 269; Domat's Civil Law (Cushing's ed.) part 1, book 1, sec. 4, p. 390-1-2-3. By Spanish law, no writing was necessary to pass land. The distinction between real and personal property was unknown. The paraphernal property of the wife was as absolutely under her disposition and control as if she were a *feme sole*. Authentic acts proved themselves, being made before public officers; other contracts, whether verbal or written, required proof. That is supplied in this case, as we show that it was done in the presence and with the consent of the husband, he writing her name. There is a case in 12 Mar. 242, where it is said that wife could not alienate without husband's con-

sent ; but this is a modification of the doctrine which had its rise in the Louisiana code, but it makes no difference in this case, as we prove the husband's consent. Thirty years' possession under a deed which comes from the right custody, and unattended with any suspicious circumstances, proves itself. (Coventry on Conveyances, 12—24 L. Lib. ; Doe, d. v. Woolley, 8 B. & Cr. 22 ; 3 Whart. 149.) 3. Upon the supposition that the deed of Marie Colin was not effectual to pass her estate, the remaining question is upon the statute of limitations. We say that those claiming under Marie Colin are barred by the act of 1835, § 4. Marie Colin was a *feme covert* when she acquired her title. Her husband died in March, 1840, and she died in November, 1840. The possession of defendants commenced in 1820, and of course twenty years had run at the time of Louis Colin's death. The statute began to run against Marie Colin in March, 1840, the date of her husband's death ; and of course continued to run against her heirs after her death ; more than ten years elapsed between her husband's death and the commencement of suit. The fourth section of the statute of 1835 is : "If any person entitled to commence any action in this article specified, or to make any entry, be, at the time such title shall first descend or accrue, a married woman, the time during which such disability shall continue shall not be deemed any portion of the time in this article limited for the commencement of such suit, or the making such entry ; but such person may bring such action or make such entry after the time so limited, and within ten years after such disability is removed, but not after that period." See also section 5, to the same effect. The reading of this statute would seem to be very plain, although persons under disability are protected ; yet when the disability is removed, the time begins to run, and they have ten years after such disability is removed. There can not be successive disabilities in different persons claiming the same title. It will be conceded, when the statute has commenced running, its effect or operation will not be stayed by any disability in the person upon whom the titles

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may descend, or to whom it may come. The plain and obvious meaning of the statute is, that persons under disability, when their right of entry or of action accrued, shall have ten years after the removal of the disability in which to commence their suit. Sec. 7, art. 3, p. 305: "No person shall avail himself of any disability enumerated in this act, unless such disability existed at the time of this right of action or entry accrued." Section 11 of art. 3 was supposed to give the act a different construction: "The provisions of this act shall not apply to any actions commenced, nor to any case where the *right of action or of entry* shall have accrued before the time when this act takes effect, but the same shall remain subject to the laws now in force." When did the right of action or of entry of Marie Colin first accrue? Clearly she had neither the right of action nor of entry until her husband's death. During his life he had the usufruct—the possession—his life estate was liable for his debt—might be assigned or transferred—the wife was precluded from any separate or distinct enjoyment until his death. She could not bring an action; her right of action did not, therefore, accrue until her husband's death, in March, 1840. Then her right of action accrued, and then the statute began to run. Under a similar statute in New York, this construction has been maintained. (*Jackson v. Johnson*, 5 Cow. 74; *Wilson v. Betts*, 4 Denio, 201; *Carpenter v. Liebenham*, 2 Barb. Chy. Rep. 314; 2 Preston on Abstracts, 341; 7 B. Monroe, 236. See also Hilliard on Real Property, ch. 21, Statutes of Limitations, vol. 2, p. 193-4; 1st ed. of vol. 2, and cases there cited; 2d ed., p. 778-181 of vol. 2.)

SCOTT, Judge delivered the opinion of the court.

1. Pierre Reaume marrying in 1815, by the birth of issue during the same year became tenant by the curtesy initiate. The estate of tenancy by the curtesy must be regarded as co-eval in existence with the estate in dower. When the law broke down the community existing under the Spanish government

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and created dower for the wife, it at the same time recognized the existence of the tenancy by the curtesy for the husband. In the case of *Riddick v. Walsh*, (15 Mo. 519,) this court held that the territorial act of July 4, 1807, abolished the Spanish law of community and gave the wife dower in lieu of her interest under the Spanish law. As a tenancy by the curtesy is recognized by the same act, it must be intended that the husband's right in the community was taken away at the same time, and the curtesy given as a part equivalent for it.

2. P. Reaume, being tenant by the curtesy initiate, and having a life estate by virtue of his marriage, his conveyance operated to convey to Pierre Chouteau an estate during his (Reaume's) life. He had no power to convey a life estate to Chouteau, as his interest in the estate did not permit it. Had Reaume been seized in fee, his conveyance to Chouteau would have given him (Chouteau) a life estate, that being deemed the most valuable in law. (Co. Lit. 1 vol., 30, a; 1 Hilliard on Real Property, 120.

3. Pierre Reaume being still alive, his life estate is outstanding in Chouteau or his representatives, and prevents a recovery by the plaintiffs, who are children of the marriage of P. Reaume with their mother as to the share of their grandmother, Louisa, as well as to the share of Lewis, who died without children prior to the conveyance to Chouteau in 1819, and of whose interest so much as was owned by the mother of the plaintiffs passed by Reaume's deed.

4. The case of *McNair v. Lindell*, (4 Mo. 380,) decides nothing more than that a conveyance made by the husband and wife during the period between the introduction of the common law on January 19th, 1816, and the statute enabling husband and wife to convey real estate belonging to the wife, passed on the 22d June, 1821, in pursuance to the statute law then in force regulating the conveyances of married men's estates and the mode of relinquishing dower interests therein, will be effectual to convey the real estate belonging to the wife. That case goes so far and no further. It leaves it a matter of doubt

whether the determination rested on the common law or on the Spanish law. If on the Spanish law, then the Spanish law was retained only so far as to sustain that case and those similarly situated, and no further. The inducement which has prevailed with this court heretofore, in upholding that opinion, was a persuasion that men acting under it had acquired rights which it was deemed unwise to disturb. After the introduction of the common law, the Spanish law no longer had any existence here. It has only been regarded in the interpretation of contracts which had been made before its abrogation and on the adjustment of rights which had accrued prior to the introduction of the common law, just as we would look at this day to the laws of Spain, in interpreting a contract which had been made in that kingdom.

5. The principle that ancient deeds accompanying the possession, and produced from the appropriate custody, prove themselves, has no application to this case. At the date of the deed in question, the law prescribed a mode by which estates should be conveyed. If that law was observed, this court has held that married women might convey their estates by complying with its provisions. If the law then in force regulating conveyances has not been complied with, how can we presume that a deed has been regularly executed when we see from the very instrument produced, in whose aid the presumption is sought, that the law, in almost every particular, has been violated? Can we presume that the law has been complied with when we see, from the very face of the deed, that it has not been? When an instrument itself tells us that the law has not been observed in its creation, how can we, from length of time or any other consideration, say that it has been? Can a presumption in favor of a deed arise when the deed itself tells us that such a presumption is false? The statute in force at the date of the deed required the wife to join in it with her husband, and acknowledge it before the proper officer, and to declare that she executed it voluntarily and without compulsion or undue influence of her husband. Here the wife's name alone appears to the deed,

and it is not acknowledged at all. (*Beall v. Lynn*, 6 Harr. & John. 351.)

6. The deed of P. Reaume and his wife, executed in Illinois, and acknowledged before a notary, is of no validity as against her. There is no pretence that a deed so executed and acknowledged is a compliance with the statute regulating conveyances then in force.

7. The deed, moreover, wants words of perpetuity, which were essentially necessary at its date to create an estate in fee simple. Its reference to the deed, on the back of which it was written, is not of such a character as to enlarge the life estate conveyed to a fee simple. This is one of those cases in which the bare intent of the parties cannot prevail. The law had appropriated certain words for passing a fee simple in real estate, and unless they were used, the intent, however forcibly expressed, could not prevail.

8. As to the question whether actual seizin of the wife's land is necessary to entitle the husband to curtesy, we are of the opinion that such an idea never prevailed here. Whatever may be the common law on the subject, the circumstances of the country demand a modification of the rule. Titles to land conferred by the United States, were supposed to give seizin in deed to purchasers. Descents with us depend not on actual seizin, but on the statute regulating descents, and we have allowed the conveyance of lands whilst in the adverse possession of others. (*Green v. Leter*, 8 Cr.; *Cook v. Foster*, 2 Gilman, 652: 4 Kent, 30.)

9. Mrs. Colin was a *feme covert* when her right of entry accrued. It is clear, from the language of the statute of limitations, that a right of entry may accrue to a married woman. The 16th section of the third article of the act prescribing the times of commencing actions, directs that the provisions of that statute shall not apply to cases where the right of action or entry shall have accrued before the first day of December, 1835, but the same shall remain subject to the laws then in force. By the law in force prior to the 1st December, 1835, a married

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woman was allowed twenty years within which to bring her action after she was discoverd. Mrs. Colin's husband died in 1840, consequently she had twenty years from his death within which she might bring her action, her right of entry having accrued prior to the 1st of December, 1835.

Each party having sued out a writ of error on the judgment, the entire judgment is affirmed, each party paying the costs of his writ in this case.

RYLAND, J. I agree to affirm the judgment, but do not assent to all the views taken by Judge Scott. I differ with him in some important propositions laid down in the above opinion.

HOGAN, Respondent, v. PAGE, Appellant.

1. A. claiming under B. presented to the old board of commissioners, May 23, 1808, for confirmation, a claim to a lot of one by forty arpens. He however produced before the board no evidence of any kind showing a derivative title from B. The board, in confirming the claim, use the following language: "The board grant to the representatives of B. the lot and order a survey," &c. *Held*, that this is not a confirmation of the lot to A.; that, in order that the confirmation may enure to the benefit of A., he must show a derivative title from B.
2. A deed in which the interest conveyed is described as follows, to-wit: "All the right, title, interest and estate which we or either of us have or may have to a certain tract of land which the said Louis Lemonde, now deceased, but formerly resident, &c., acquired or claimed to have acquired of Auguste Conde, formerly of St. Louis, now deceased, and which land was supposed to have been situated in the Grand prairie, in said county and state, but for which land said parties of the first part have never seen any deed from said Auguste Conde to said Louis Lemonde;" is not void for uncertainty upon its face.

Appeal from St. Louis Court of Common Pleas.

The facts of this case are sufficiently set forth in the opinion of the court, it being entirely unnecessary to set forth the instructions given and refused by the court below.

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Williams and Shepley, for appellant. 1. The confirmation was not to Louis Lemonde. (6 Peters, 766; 10 Peters, 334; *Strother v. Lucas*, 12 Peters, 458; *Stoddard v. Chambers*, 2 How. 284; *Bissell v. Penrose*, 8 How. 316; 8 How. 335; *Landes v. Brandt*, 10 How. 348.) 2. A survey is an integer, and as soon as it is shown to be wrong in any respect, its integrity as a survey is gone. It can not be good for part and bad for part. It is either all good or all bad. 3. The deed from A. Reymond and others, under which plaintiff claimed and recovered, is void for uncertainty and indefiniteness of description of the thing sold. It did not purport to convey, and did not upon its face convey the land in dispute.

T. Polk, for respondent. 1. The confirmation given in evidence by the plaintiff enured to Louis Lemonde. (8 How. 337; 6 Pet. 770; 12 Pet. 458; 10 How. 348; *Boone v. Moore*, 14 Mo. 420.) United States survey No. 1276, was properly admitted in evidence. (R. C. 1845, 469; U. S. Statute at large, 325; 3 Story's Laws, 1600.) 2. The title under the confirmation, given in evidence by the plaintiff, is a better title than that under the New Madrid location, under *Martin Coontz*, given in evidence by defendant. 3. Survey No. 1276 is *prima facie* evidence of the true location, boundaries and extent of the land mentioned in the confirmation given in evidence by plaintiff. (*McGill v. Somers*, 15 Mo. 87; *West v. Cochran*, 17 How.) 4. The deed of A. Reymond and others to plaintiff, is not void for uncertainty. The description in the deed accurately and exactly describes the land confirmed. (4 Cruise Dig. 287; 4 Mass. 205; 10 How. 354.) 5. The court did right in instructing the jury that, in so far as *Brown's* old survey of the exterior boundary of the Grand prairie common field was changed by the official survey of 1838, it had no authority.

RYLAND, Judge, delivered the opinion of the court.

The following is the statement of the case agreed to by the council of both parties, before this court:

“ This was an action of ejectment, brought in the Common Pleas Court, on the 27th July, 1852, by appellee against appellant, for a portion of a common field lot in the Grand prairie common field of St. Louis, which lot is one arpent in front by forty arpens in depth, being U. S. survey No. 1276, confirmed by the old board on the 13th November, 1811. The defendant had possession of the premises at the commencement of the suit, and the damages and monthly value, as found by the jury, were supported by the evidence in the cause.

“ On the trial, the plaintiff gave in evidence duly certified copy of the minutes of the confirmation by the old board. This was objected to as not being properly certified; thereupon the court excluded so much of said certificate as follows, to-wit: ‘ Assignee of Auguste Condé,’ and allowed the paper to be read, except the last certificate therein. As a part of said confirmation papers, the concession of said two by forty arpens to Auguste Condé, dated 10th January, 1770, recorded in *livre terrain*, No. 1, p. 31, was also read in evidence.

“ The notice for the confirmation of the said claim by the old board, was given to the recorder of land titles, on the 23d May, 1808, by Louis Lemonde, for himself, claiming it as his own, and describing it as ‘ a tract of land situate Big prairie, district of St. Louis, formerly the property of Mr. Condé, containing one arpent by forty, as appears by the concession remaining in your office, book No. 1, p. 31.’

“ The confirmation which was of the date of 13th November, 1811, was as follows: ‘ Cert. 1276. Louis Lemonde, assignee of Auguste Condé, claiming one by forty arpens of land, situate Big prairie, district of St. Louis, produces a concession from St. Ange and Labuxiere, L. G., dated 10th January, 1770. The board grant to the representatives of Auguste Condé forty arpens of land under the provisions of the second section of the act of congress entitled ‘ An act respecting claims to land, and passed 3d March, 1807,’ and order that the same be surveyed conformably to possession, (survey at ex-

pense of United States,) as ascertained by report of survey dated as above, January 10th, 1770.

"Plaintiff also gave in evidence a certified copy of the said U. S. survey No. 1276, which was objected to as not being properly certified. Said certificate was as follows :

' Office of Surveyor General for Illinois and Missouri,
' St. Louis, September 3d, 1851.

' I hereby certify that the foregoing plat and description of survey No. 1276, in the name of the 'legal representatives of Auguste Condé,' and also the statement of interferences, are correctly copied from pages 291 and 292, of book E, of records, on file in this office.

' M. LEWIS CLARK, Surveyor Gen'l.'

"The plaintiff then gave evidence showing that the title of Louis Lemonde had passed by descent to Angelique Reymond, wife of Abraham Reymond, Ann Fontaine and Baptiste Lemonde; that said Abraham was the husband of said Angelique, by whom he had had several children, who are still living.

"Plaintiff then gave in evidence a quit claim deed from Abraham Reymond and Angelique his wife, formerly Reymond, Ann Fontaine, formerly Lemonde, and Baptiste Lemonde, to himself, dated the 2d March, 1850, having proved by said Abraham that said deed had been signed, acknowledged and delivered by himself and wife and the other grantors therein named. The said deed contained the following description of the property conveyed: "All the right, title, interest and estate which we or either of us have or may have to a certain tract of land which the said Louis Lemonde, now deceased, but formerly resident of said city and county and state, acquired or claimed to have acquired of Auguste Condé, formerly of St. Louis, now deceased, and which land was supposed to have been situated in the Grand prairie, in said county and state, but for which land said parties of the first part have never seen any deed from said Auguste Condé to said Louis Lemonde.

"The plaintiff having closed his case, the defendant asked the court to give the following instruction to the jury: 'Upon the

case, as made out by the plaintiff, he is not entitled to recover ;' which the court refused.

"The defendant below, appellant here, then gave in evidence title papers tending to show that he was claiming said land under the New Madrid location, made upon certificate No. 145, in the name of Martin Coontz or his legal representatives, for which a patent certificate had issued, dated 17th November, 1822. Defendant then offered in evidence various documents and oral proof, tending to show that the land sued for was improperly and incorrectly located under the confirmation of 1811, by survey No. 1276. Among the documents were, 1st, field notes of Brown's survey of the outboundary of the Grand prairie fields, made in 1817 ; 2d, township plat.

"Defendants also introduced evidence tending to show that the survey 1276, as well as those north it, up to and including that of Mainville dit Deschene, were extended too far east by nine arpens and thirty-six feet.

"And having closed his case, the plaintiff introduced documentary and other proof, tending to show that the land was correctly located by survey No. 1276, and that there was no error in the extension of the survey of Mainville dit Deschene and those south of it, of nine arpens and thirty-six feet further east than those north of it ; also that the said Brown's outboundary was erroneous south of survey No. 1253, of Antoine Morin, under Alexis Picart."

Upon this statement arises the main question in the case : does the confirmation by the old board of commissioners enure to Louis Lemonde, putting in him the title to the land confirmed ? If it does, then the plaintiff must recover ; if it does not, then the plaintiff's claim of title is incomplete and he can not recover in this action.

Let us examine this question. This was a confirmation by the old board, dated November 13, 1811. Among the papers of the confirmation appears the concession of two by forty arpens of land to Auguste Condé, dated 10th January, 1770, recorded

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in *livre terrain*, No. 1, p. 31. The notice of the claim filed with the recorder of land titles, on the 23d of May, 1808, by Louis Lemonde, is as follows: "To Frederick Bates, Esq., recorder of land titles for the territory of Louisiana: Sir—Take notice that I claim a tract of land situate Big prairie, district of St. Louis, formerly the property of Mr. Condé, containing one arpent by forty, as appears by the concession remaining in your office, book No. 1, p. 31. St. Louis, 23d May, 1808.

his

" LOUIS X LEMONDE,
mark.

"Witness: M. P. LEDUC."

The confirmation is as follows: "Louis Lemonde, assignee of Auguste Condé, claiming one by forty arpens of land, situate Big prairie, district of St. Louis, produces a concession from St. Ange and Labuxiere, L. G., dated 10th January, 1770. The board grant to the representatives of Auguste Condé forty arpens of land under the provisions of the second section of the act of congress entitled 'An act respecting claims to land, passed 3d March, 1807,' and order that the same be surveyed conformably to possession, (survey at expense of United States,) as ascertained by report of survey dated as above, 10th January, 1770."

Here the concession was made to Condé in 1770. Lemonde filed the notice of the claim in May, 1808. The board grant to the representatives of Condé forty arpens of land in November, 1811.

Nowhere does it appear among the records of the case that Lemonde filed before the recorder any evidence of his derivation of title from Condé. There is nothing showing or stating how he claims title, or showing the nature of his claim. He gives the notice: "Sir—I claim a tract of land situate in Big prairie, district of St. Louis, formerly the property of Mr. Condé." He does not set forth how, nor does he file any evidences of his right to claim—does not show himself an heir or a legal representative of Condé.

The board did not grant to Lemonde, as assignee of Condé. They did not commit themselves to the fact that he was assignee; they disregard Lemonde and grant to the representatives of Condé.

The fourth section of the act of congress of 2d March, 1805, has the following among other provisions: "And every person claiming lands in the said territories, by virtue of the two first sections of this act, or by virtue of any grant or incomplete title, bearing date subsequent to the first of October, one thousand eight hundred, *shall*, before the first day of March, one thousand eight hundred and six, deliver to the register of the land office or recorder of land titles, within whose district the land may be, *a notice* in writing, stating the nature of his claim, together with a plat of the tract or tracts claimed; and shall also on or before that day, deliver to the said register or recorder, for the purposes of being recorded, every *grant, order of survey, deed, conveyance, or other written evidence* of his claim, and the same shall be recorded by the register or recorder, or by the translator hereinafter mentioned, in books to be kept by them for that purpose, &c., &c.; provided, however, that where lands are claimed by virtue of a complete French or Spanish grant, as aforesaid, it shall not be necessary for the claimant to have any other evidence of his claim recorded, except the original grant or patent, together with the warrant or order of survey and the plat; but all the other conveyances or deeds shall be deposited with the register or recorder, to be by them laid before the commissioners hereinafter directed to be appointed, when they shall take the claim in consideration. So much of this fourth section of the act of 1805 as required the claimant to deliver to the register or recorder the plat of the tract or tracts, was repealed by the third section of the act of 28th February, 1816, still leaving it the duty to file the *grant, order of survey, deed, conveyance, or other written evidence of title*. The fifth section of the act of 3d March, 1807, extended the time of delivering the notices in writing and the written evidences of claims to the register

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and recorder to the 1st of July, 1808. Under this act, thus extending the time, the notice in the present case was given; this act still speaks of "the written evidences of claims to lands."

Let us see what is to be done by the claimant. He is to give notice of the *nature* and extent of his claim. What is meant by the nature of his claim? Will it answer to say to the recorder: "Sir—Take notice I claim a tract of land formerly belonging to A. B., containing one by forty arpens, as appears by the concession remaining in your office, book 1, p. 31"? This can not be said to show the nature of his claim. He must go further; show by what means he claims, and then file his written evidence of claim. This notice of claim does not explain its nature nor extent. The words, "as appears by concession remaining in your office," do not show the nature or manner of his claim, but allude only to the grant or concession for the description of the tract conceded.

The acts of 1805, 1806 and 1807 all continue the requisition of delivering to the register or recorder the written evidence of the claim.

The old board, although they use the phrase, "the board grant" to the representatives of Auguste Condé, did not, in reality grant, nor had the board the power to grant the land. They had power to hear and decide all matters respecting such claims, and to decide, in a summary way, according to justice and equity, on claims filed with the recorder, in conformity with the provisions of the act, and on all complete French and Spanish grants, the evidence of which, though not thus filed, may be found of record on the public records of such grants; evidently requiring the evidence of all incomplete grants to be filed and placed, for the consideration of the board, before them. This old board did not grant—had no power to grant; they decided whose grants or concessions heretofore made by the French or Spanish authorities, ought to be confirmed, and their decision was good and valid against the United States. They did not therefore grant the land in the present case, but decided that Condé's representatives were entitled to it. That

is the effect of their decision in whatever language couched. This board were empowered to decide upon the claims. They could determine to whom the grant, which had heretofore been made, was to be confirmed, and in this case, they do determine. Lemonde says: "I claim the land, formerly the property of Mr. Condé." The board say: "We grant the land to Condé's representatives." Now, unless Lemonde shows by evidence, by conveyances, or by other facts, that he is such representative, the grant can not enure by its terms to his benefit. The board did not, by the use of the terms representatives of Condé, intend to be understood as deciding more than that the grant was good, and by their decision divested the United States of their title. The grant heretofore made to Auguste Condé is good; and they now decide that it should be confirmed to his legal representatives, which decision makes it a good and valid grant against the United States, in favor of Condé's legal representatives, and thereby the United States became divested of the title. But the board did not say, and would not say to Lemonde, "we confirm the grant to you, as assignee of Condé." The board manifestly left the question, as to who were the legal representatives of Condé, open, to be hereafter settled by other authority. The board was not willing, without evidence of transfers before them, to grant or confirm to the person who barely filed the notice, and exhibited no evidences of title before them. Therefore, there is meaning in the phrase, "the board grant the one by forty arpens of land to the legal representatives of Auguste Condé." If Lemonde can show himself to be such representative by other evidence of title in writing, or by any fact, that he is such representative, then the confirmation or grant, as the board call it, is to him or for him. But, unless he can, then it is to the legal representatives of Condé, and not to Lemonde. In all the cases before the Supreme Court of the United States, in which they have held or intimated that the confirmation was to him who filed the claim, there was evidence of the intermediate transfers or deeds or conveyances from the original grantee to the claimant. The claimant shows that he

is the assignee, or the real or supposed owner, by his evidences of title, and the confirmation is, in effect, to him. Because the person in whose name the original grant was made having parted with his interest in the land to the person who files the claim and gives the notice, can not be said to be a claimant; nor has he any grant to be confirmed. The person claiming shows this; he files his written evidences of claim before the register or recorder; the board can see that the original grantee has parted with his right; has neither land nor claim, nor can he be a claimant.

Tillier, in the case of Bissell v. Penrose, filed the claim in the office of the recorder; prosecuted it before the board of commissioners. He represented the interest of one of the sons of Vasquez, in quantity eight hundred arpens. There were four sons, each one entitled to the same quantity. Tillier procured the private survey of his share, and filed his separate claim for that amount, *together with the conveyance* from the original grantee. Under these circumstances, it was insisted that the confirmation was to the son and not to Tillier. The Supreme Court remarked: "It was difficult to perceive what right or claim the son had, either before the commissioners or congress, to be confirmed. Having parted with all his interest, he had neither land nor claim, nor was he a claimant, as that term is regarded as applicable to those only in whose name the claim was filed with the recorder, under the act of 1805." That is, in accordance with the act, filing all the written evidences of transfers and other deeds and conveyances. Here Tillier was regarded as the confirmee; he had filed the written evidences of his claim before the recorder. These evidences showed that young Vasquez had no claim, but that Tillier had.

Not like this case, Lemonde files no evidence of derivative title—shows no right to the land—simply claims it without any evidence. The board confirmed the grant to Conde's representatives. Now I do not see how this confirmation, by its terms, can enure to Lemonde from what is exhibited in this case. In Stoddard v. Chambers, there were intermediate con-

veyances from Bell to Mackay, and from Mackay to Stoddard. I find no case where that court has decided that the bare giving of the notice, without any evidence of title, or any written evidences from the original grantee to him who gives the notice, would make the confirmation to the original grantee enure to him who gave such notice. In all the cases that have come under my observation, where this doctrine has been laid down, there were evidences of transfer from the original grantee to the claimant who gave the notice and presented the claim.

In the case of *Boone v. Moore*, (14 Mo. 420,) there were intermediate transfers and conveyances, showing the title had passed from David Cole to Mackay, and from Mackay to Richardson. These written evidences before the recorder showed that neither Cole nor Mackay had any land to be confirmed. They were not and could not be claimants. Richardson had obtained the land as granted to Cole from Mackay, who had personally obtained it from Cole. He was the claimant, and although the confirmation was to David Cole, or his legal representatives, yet it might well come to Richardson, for he showed that he had the title of David Cole, by his written evidences before the board. True, the judge, in delivering the opinion, rejects as immaterial all these intermediate conveyances, and holds that, under the decisions of the Supreme Court of the United States, Richardson had the title confirmed to him; it was in him, and not in Cole or his representatives, he being the person who filed the claim before the recorder. Yet, as that Supreme Court has never pronounced this doctrine in any other cases than such as manifestly showed by the evidences filed before the recorder, that the claimant was the then owner of what had heretofore been granted to another, I feel unwilling to extend the doctrine to the length it was carried in this case of *Boone v. Moore*, because there was no necessity of going that far in that case. The record showed the case was within the principle of *Bissell v. Penrose*, and might have been settled by it if the question of evidence had been determined; and to get clear of this question, the case went a step in advance of the doctrine of the Supreme

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Court, or rather applied that doctrine to a case not within the range of the cases where it had been first promulgated.

I forbear to notice the other points, further than to say that we do not consider the deed from Lemonde's heirs to the plaintiff void for uncertainty.

The court should have instructed the jury, as requested by defendant, "that, from the plaintiff's showing, he could not recover in the present action." Its judgment is reversed, and the cause remanded; the other judges concurring.

MERCIER *et al.*, Respondents, *vs.* LETCHER *et al.*, Appellants.

1. C. M. having a Spanish concession and survey, died in 1802, leaving five children, and a widow, who afterwards married one J. M. C. J. M. C. claiming to be the representative of C. M., (whose widow, he stated in the notice of claim presented by him, he had married,) presented the claim for confirmation to the old board of commissioners; but made no proof whatever of any derivation of title from C. M. to himself. The board, October 9, 1810, confirmed the claim to C. M. Held, that this confirmation was not void, but enured to the benefit of the representatives of C. M. It did not enure to the benefit of J. M. C. (Hogan v. Page, ante, affirmed.)

Appeal from St. Louis Land Court.

S. Reber, for appellants. 1. The confirmation to Charles Mercier is void, because he was dead before the claim was presented to the recorder. An entry in the name of a dead man is void. (6 Pet. 261; 3 A. K. Marsh. 1080; 4 Pet. 345.) So also a patent. (12 Pet. 297-8; 1 Mo. 540; 4 Bibb, 385; 10 How. 373.) 2. If the confirmation be held to be a confirmation to the representatives of Charles Mercier, then it is a confirmation to Jean Marie Courtois, he having claimed the land by virtue of his marriage with the widow of Mercier, and filed the claim before the recorder. 3. The partition proceedings under which the plaintiffs claim are void. (Jackson v. Brown, 3 Johns. 459.)

B. A. Hill, for respondents.

RYLAND, Judge, delivered the opinion of the court.

This was an action in the nature of ejectment, to recover possession of a common field lot in the common field of St. Ferdinand. The plaintiffs claimed title under Charles Mercier, deceased, in whose name the land was (claimed to be) confirmed by the old board, and surveyed.

The deceased, Charles Mercier, died in 1802, leaving a widow, who married Jean Marie Courtois, in the same year, and five children, Charles Mercier, one of the plaintiffs, and four daughters.

Jean Marie Courtois, claiming a larger tract, of which the land in controversy was part, as the representative of the deceased Mercier, whose widow (he said in his claim) he had married, gave notice of his claim to the recorder of land titles, and filed with the notice the Spanish survey of the land which had been made for Mercier. The papers were duly recorded by the recorder in the books of his office.

On the 19th of August, 1806, the board acted on the claim of "The representatives of Charles Mercier"—received proof of cultivation of the land claimed, and rejected it. The said proceedings of the board were recorded in book No. 1, p. 477. On the 9th of October, 1810, the board took up the claim again, and referring to the said book No. 1, p. 477, confirmed it to "Charles Mercier," and on the same day the board issued a patent certificate in the name of "Charles Mercier."

All the daughters of Mercier married between the years 1810 and 1818, and were under the disability of coverture until within less than twenty years before suit was brought.

In 1848, the said five children of Mercier instituted proceedings in the St. Louis Circuit Court, for partition of the land, and the part in controversy was sold in that proceeding and conveyed to the plaintiffs in 1850.

In 1805, Jean Marie Courtois and wife (former widow of Mercier) conveyed the land in controversy, with general war-

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ranty to Richard Sappington, and defendants have Sappington's title.

In 1824, Mercier, the plaintiff, conveyed his interest in the land to Jean Marie Courtois, and defendants have also that title. The defendants and those under whom they claim have been in continuous and adverse possession of the land since the year 1814.

The court, sitting as a jury, found the facts as above stated, and gave judgment in favor of the plaintiffs for four-fifths of the land. The defendants filed their motion for a review, which being overruled, they bring the cause to this court by appeal.

From this statement, it appears that some of the questions arising on this record are the same as those which have just been decided by this court in the case of Hogan v. Page. The original grant was to Charles Mercier. At the time of the confirmation, he had been dead for several years. Courtois, who married the widow of Charles Mercier, delivered to the recorder of land titles for the territory of Louisiana, a notice in writing as follows, to-wit: "Jean Marie Courtois, representative of Charles Mercier, whose widow he has married, claimed a tract of ——— arpens of land on the right or south bank of the Missouri, surveyed for said Mercier, as per the following certificate." Courtois delivered with the notice a plat and survey of the said land, made by Antoine Soulard, for the said Mercier, on the 5th March, 1797, by authority of a letter from the lieutenant governor, Zenon Trudeau. This notice and survey was recorded by the recorder of land titles, in a book kept for that purpose. C. Mercier died 28th June, 1802, leaving a widow and five children — four daughters and a son — bearing his father's name. At first, the board rejected the claim. Subsequently, on the 9th October, 1810, the following further proceedings were had before the said board: "Certificate No. 496, Charles Mercier claiming 208 acres and 48-100ths of an acre of land, (see book No. 1, p. 477,) produces to the board a plat of survey of St. Ferdinand fields, on which claimant is No. 25. The board confirm to Charles Mercier 208 48-100ths

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acres, as described in a plat of survey executed by Silas Bent, principal deputy, and dated 28th November, 1809, on file with the recorder." And on the 9th October, 1809, said board of commissioners issued certificate No. 496, as follows: "We, the undersigned commissioners for ascertaining and adjusting the titles and claims to land in the territory of Louisiana, have decided that Charles Mercier, original claimant, is entitled to a patent under the provisions of the 4th section of an act of congress, passed 3d of March, 1807, for 208 acres 48-100ths of land, situated in the district of St. Louis, St. Ferdinand fields, as described," &c.

This confirmation, according to the opinion of this court, did not enure to Courtois. He had married the widow of the original grantee, and thereby claimed as his representative. He produced no evidence of title from Mercier. The board did not make this confirmation to the legal representatives of Charles Mercier by express terms, but confirmed the grant to Mercier himself. The board knew that Mercier was dead. Courtois had informed them that he claimed the land as representative of said Mercier, because he had married his widow. They well knew that this did not make him the legal representative of Mercier. They refused to recognize Courtois as such, and confirmed the grant to *Charles Mercier*. This confirmation can not enure, under our view of the law, to Courtois. He filed no evidence of title—no intermediate conveyances from the original grantee. His marriage of the widow gave him no right to the land.

The question now arises, is this confirmation valid? Has it any legal operation? If we apply to it the rules of construction which common law lawyers use in construing grants at common law, we shall at once pronounce it invalid. But when we look at the powers and duties of the commissioners, the object of their creation, the causes which required such a tribunal, and the matters which were necessarily to come before them for decision, we unhesitatingly pronounce the confirmation good and valid in law. What is it that is confirmed? It is the original right or grant which had been made by the Spanish authorities

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to Charles Mercier. The board of commissioners did not make grants—they had no power to grant. They were to decide upon grants heretofore made by the French and Spanish authorities, and when they decide and confirm the grant, they confirm the original grant as it was made. They say this grant to Charles Mercier is confirmed. They thereby decide that then, that is, on the 9th October, 1810, this grant is a valid title against the United States; they by their confirmation in effect declare, at the time it is pronounced,* that the grant to Charles Mercier is a valid and subsisting title against the United States. If this be the effect of their decision, and that it is there is scarcely a doubt, then, as it declares the grant good as against the United States, it must, by operation of law, be good in favor of those who have by law the right to claim it under Charles Mercier, either as grantees, devisees or heirs. In this case there are no persons claiming under this grant from Mercier except his heirs, and they are entitled to it. Courtois has no right, nor has his widow. The right then being in the heirs of Mercier, they had the power to have the property divided among them by partition, and a sale upon the proceedings for partition among the heirs of Mercier is good and sufficient to pass the title to the purchaser at such sale of all the heirs who were parties to the proceedings.

The effect of the deed of Charles Mercier, the son, to Courtois in 1824, was to pass to him his title as one of the heirs. Upon the whole case, we think the court below decided correctly, and its judgment is affirmed; the other judges concurring.

MENKENS, Appellant, v. OVENHOUSE, Respondent.

1. Where in an action for the possession of land, the defence relied on is the statute of limitations, and the court finds that in the year 1818, one B., under whom defendant claimed, took possession of the tract sued for, under a deed of conveyance of the same, and let it out to various tenants at various times after the date of the purchase, until his death; that at all times since

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his purchase, B., and since his death his representatives have claimed the said land and exercised ownership over it, by entering upon it, by cutting timber and wood upon it, by prosecuting others for trespasses to the land, and by constantly having an agent living near the land with authority to superintend and protect it, and rent it out, and by regularly paying the taxes; that these successive possessions were actual, continuous, and adverse to the plaintiff and those under whom he claimed; *held*, that these facts found by the court warranted a judgment for defendant, notwithstanding it was also found that the land sued for was not used as a homestead or dwelling, and that during B.'s claim the land was often untenanted and uncultivated, sometimes for several years at a time; that at such times the fences were thrown down or destroyed, and the land lay open. (SCOTT, J., dissenting.)

Appeal from St. Louis Land Court.

Casselberry, for appellant. 1. There was no sufficient adverse possession. There should be an actual, hostile, distinct, visible and notorious corporeal occupation of the land during the whole of the time the statute has to run. (5 Cow. 219; 2 Johns. 230; 2 N. & McC. 343; 1 Rice, 10; 1 Metc. 528; 10 Johns. 477; 4 Mass. 416; 2 Aik. 364; 4 Bibb, 544; 1 Marsh. 59, 506; 5 Litt. 22; 6 S. & R. 21; 11 Gill & Jo. 371.) 2. The payment of taxes alone, though it may extend the limits of a possession, does not constitute it, and there must accompany it an actual occupancy of at least a part of the land. (10 Watts, 142; 4 Whart. 298.)

Gantt, for respondent. 1. The fact that the land was sometimes untenanted, and the fences occasionally thrown down, will not prevent the running of the statute of limitation. (17 S. & R. 104; 10 id. 303; 7 Watts, 35; 3 id. 69; 11 Pet. C. C. 41; 10 Pet. 442.)

RYLAND, Judge, delivered the opinion of the court.

The only question in this case is, will the finding of the facts by the court sustain the judgment rendered thereon? There is no evidence preserved on the record, no motion to review the finding of the facts by the court, and nothing for this court to consider but the finding of the facts and the judgment thereon.

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The facts found are as follows : " A tract of land, whereof the land in controversy is part, was conceded by the lieutenant governor Piernas to Clement Delor de Traget, in 1771, and was confirmed to his representatives (not naming them) by the act of congress of 29th April, 1816. Pierre Marie (under whom plaintiff claims) was one of the grandsons of said Delor, being a son of one of his daughters by his first marriage. Pierre Marie's mother, Rosette by name, was married to Alexis Marie, by whom she had three sons, all of whom are dead. The first two, Alexis and Gregoire, died respectively in 1836 and 1849, and Pierre died this year, in the summer. Clement Delor de Traget died before the change of government, and both Alexis and Rosette Marie died before 1822. Clement Delor de Traget had ten children, sons and daughters, five by the first marriage and five by the second. Two of the sons by the first marriage died unmarried and without issue. C. Delor de Traget had a written contract of marriage with his second wife, purporting to establish a community of goods, according to the laws of Castile, and importing that he had made a like contract with his first wife. On the 20th October, 1851, Pierre Marie conveyed to the plaintiff all his right to the land, by a quit claim deed, for the consideration of two dollars. The annual value of said land is three dollars per acre. There was testimony tending to prove that before the year 1814, and after the change of government, persons other than the descendants and heirs of said Clement Delor, and among them one Glenn possessed and cultivated the land in question. On the 7th March, 1814, persons claiming to be legal representatives of Glenn conveyed the said land by deed to one Michael Tesson, called Honoré, and said Honoré entered upon the land under that conveyance, and possessed and cultivated the same. On the 24th of February, 1817, said Honoré, by deed, conveyed the said land to one Joseph Presse, who entered upon it under that conveyance, and possessed and cultivated the same. On the 19th March, 1818, said Presse, by deed, conveyed the said land to Bartholomy Berthold, who entered upon it under that convey-

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ance, and possessed the same, and let it out to various tenants, at different times, from the date of his purchase, in 1818, till his death; some of which tenants cultivated the land, and others used it as a race course and place of amusement.

“After the death of said Berthold, his legal representatives had possession of said land, and the present defendant is their tenant. At all times, since the purchase of said land by said Berthold, he in his lifetime, and his representatives since his death, have claimed the said land and exercised ownership over it, by entering upon it, by cutting timber and wood upon it, and prosecuting others, and by constantly having an agent living near the land, with authority to superintend and protect it, and rent it out, and by regularly paying the taxes. The land was in the common field of Carondelet, and was not used as a homestead or dwelling place. During the time of Berthold’s claim, the land was often untenanted and uncultivated; sometimes for several years at a time. At such times, the fences were thrown down or destroyed, and the land lay open. The land was in possession of said Honoré from the time of his purchase thereof, in 1814, until he conveyed it to Presse, as above stated. It was then in Presse’s possession until he conveyed it to Berthold, as above stated. It was in Berthold’s possession until his death, and ever since his death it has been and now is in the possession of his legal representatives.

“And those successive possessions were actual, continuous, and adverse to the plaintiff and those under whom he claims. The conclusion of law upon these facts is, that the plaintiff ought not to recover in this action. All the issues arising on the pleadings, the court finds for the defendant.”

Now upon this finding, I am of the opinion that the judgment is warranted, and that it should be affirmed. Here has been a long possession—from 1814, forty years—a possession prior to the existence of the statute of limitations in the territory, now state of Missouri. But let it begin from 1818: “On the 19th March, 1818, Presse, by deed, conveyed the land to Bartholemey

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Berthold, who entered upon it under that conveyance, and possessed the same and let it out to various tenants, at different times, from the date of his purchase until his death; some of which tenants cultivated the land, and others used it as a race course and place of amusement."

The land was not used as a homestead. The lower court expressly finds that the successive possessions of Honoré, Presse and Berthold, were "actual, continuous, and adverse to the plaintiff and those under whom he claims." The only possible ground on which any doubt can arise as to this possession, is in what is stated by the court, "that during the time of Berthold's claim, the land was often untenanted and uncultivated; sometimes for several years at a time. At such times, the fences were thrown down or destroyed, and the land lay open." There was no dwelling-house on the land; but Berthold and his representatives constantly paid taxes on the land—always had an agent looking after it and keeping off trespassers. They prosecuted others for trespasses committed on the land, and were exercising ownership over it by entering upon it and by cutting timber and wood upon it. Now I do not feel at liberty to hunt out possible objections to the finding of the facts. I am inclined to think the lower court, before which the testimony was given, is better prepared to feel the force of such evidence and to state the general facts proved, and to give the proper judgment thereon, than I may be, by barely looking over his statements of such facts. I must trust to his judgment somewhat, and when I find facts amply sufficient stated, as found by him, though he may state at the same time other facts also as found, which tend to cast some doubt over a petition of his finding, yet, if the entire finding will support his judgment, I will let it remain undisturbed. When the facts found do not warrant the judgment, I will reverse. In this case, I think the facts found do warrant the judgment.

"An entry by one man on the land of another, is an ouster of the legal possession, arising from the title or not, according to the intention with which it is done; if made otherwise, it is

a mere trespass ; in legal language, the intention guides the entry and fixes its character. It is well settled that, to constitute an adverse possession, there need not be a fence, building or other improvement. It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy, after an entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said that, where acts of ownership have been done upon the land, which, from their nature, indicate a notorious claim of property in it, and are continued for twenty years, with knowledge of an adverse claimant, without interruption or adverse entry by him for twenty years, such acts are evidence of an ouster of a former owner, and an actual adverse possession against him. Neither actual occupation, cultivation or residence are necessary to constitute actual possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts or ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." (Ewing v. Burnet, 11 Peters, 52; 6 Peters, 513; 10 Peters, 442.) Now the authorities are ample in support of the doctrine that an intruder or squatter, by entering on land, gets in law possession only so far as his immediate occupation extends, and it may be said to last no longer than his actual occupation continues. But not so with him who enters, claiming title, or under color of title. Chief Justice Gibson defines color of title thus: "I would say that an entry is, by color of title, when it is made under a *bona fide* and not a pretended claim to a title existing in another." Chief Justice Gibson, in McCall v. Neely, 3 Watts, 73, speaking of the payment of taxes, says: "It was said by Chief Justice Tilghman, in the case of Roger v. Benlow, and reported by Mr. Justice Rogers, in Read v.

Goodyear, 17 Serg. & Raw. 350, 'that payment of the taxes raises a presumption of ouster from the whole tract, and that the acquiescence of the owner is tantamount to an acknowledgment of such ouster. These dicta, though not conclusive, are entitled to a preponderating weight, as well for the respect we feel for the quarter whence they come as for their intrinsic good sense.' (Heiser v. Riehle, 7 Watts, 35.) "The statute of limitations is a statute of *repose*, which is entitled to a fair and liberal construction." "The man who enters into a tract of land, with title, has immediately, by construction of law, the actual possession of the whole tract. But he who enters without title, is a trespasser, and has no constructive possession, but is limited to the spot actually occupied. These are the general principles which govern the law of entry and possession. But there may be cases in which a jury might well presume an actual ouster, although the person who had the right was not excluded by actual enclosure or cultivation." (10 Serg. & Rawle, 306; 17 Serg. & Rawle, 109.) The case of Williams v. Dougan, reported in 20 Mo. Rep. 186, covers the main features of this case, and I think must settle it. In the case cited by plaintiff, of Doe v. Campbell, (10 Johns.) there was no regular deduction of title or privity and continuity of possession shown and deduced down from Smith to Elliot, or to any of the other defendants. To constitute a disseizin of the owner of uncultivated lands, by entry and occupation, of a party not claiming title to the land, the occupation must be of that nature and notoriety that the owner may be presumed to know that there is a possession of the land adverse to his title, otherwise a man may be disseized without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seizin has been interrupted. (4 Mass. 416.) In Sorber v. Willing, (10 Watts, 142,) it was said: "Payment of taxes alone, though it may extend the limits of an adverse possession, does not constitute it." From a general review of many of the cases reported in the books, though there is some difference between

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them, yet there may be gleaned from them the principles embraced in this opinion. There is a difference in regard to the possession of the mere trespasser and of him who enters claiming title.

Now the defendants here are in possession under a claim of title—a deed from Presse, in 1818, to Berthold, and a possession by him under that deed. His cultivation and occupation were only interrupted for a few years, when the fences were broken down. He all the time exercised acts of ownership by entering upon it, cutting down timber, prosecuting for trespasses committed on it by others, and paying continually the taxes—having an agent continually in the neighborhood to guard it from the trespasses of others, and to manage and attend to it.

If any people need repose from litigation in regard to land titles, it is the people of this county and city; and if the statute of limitations is entitled to the praise bestowed on it by Justice Rogers, of Pennsylvania, that it is a statute of repose, I am willing to give it a fair and liberal operation here, where it is so much needed.

I am therefore for affirming the judgment below. Judge Leonard concurs in affirming the judgment, but not in all the propositions laid down in the opinion.

LEONARD, J. I concur in affirming this judgment, without, however, concurring altogether in the grounds and reasonings of Judge Ryland's opinion.

SCOTT, J., dissents.

TIBEAU, Respondent, v. TIBEAU, Appellant.

1. The supreme court will not reverse a judgment on the ground that the court has not permitted a party to have the opening and the closing of the case to the jury, unless such refusal has produced a wrong to the party.

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2. An understanding between vendor and vendee, entered into at the time of sale of land, (being a parol sale under which possession is taken,) that if within a year the former should repay to the latter the purchase money, with interest, then the latter would reconvey to the former, constitutes the transaction a mortgage.

Appeal from St. Louis Circuit Court.

For the report of this case, when on error before, see 19 Mo. 78. In addition to the evidence offered at the former trial, the plaintiff introduced evidence tending to prove a tender of the mortgage money. At the close of the plaintiff's case, the defendant asked the following instruction: "1. The jury are instructed that the plaintiff can not recover;" which the court refused, and defendant excepted. Defendant then gave evidence tending to show a parol sale by plaintiff to defendant, and possession taken under the same. The defendant asked the following instructions: "2. The jury are instructed that if plaintiff re-sold the land to defendant, and possession of the land was by plaintiff, through Louis Tibeu, surrendered to defendant, then, as there is no question that the consideration was paid, the jury must find for the defendant." "3. The jury are instructed that by the pleadings it is admitted that the sum of one hundred and thirty dollars was paid by defendant for plaintiff, and the only issue to be tried by the jury, is whether this sum, so paid, was the consideration of a mortgage or of a re-sale of the land by plaintiff to defendant." "4. The jury are instructed that if plaintiff sold the land to defendant, with intent to cover up the property, and hide or conceal the same from his creditors, then plaintiff can not recover, and the jury must find for the defendant." "5. It is admitted by the pleadings that one hundred and thirty dollars were paid to or on account of plaintiff by defendant." These instructions were refused by the court, and, on its own motion, the court gave the following: "1. [This instruction is set forth in the opinion of the court.] "2. It is admitted by the plaintiff in his petition that in 1839, he owed defendant \$130." At the request of plaintiff, the court gave the following instruction:

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"3. If the jury find for the plaintiff, they will find the value of the rent of the premises from the year 1849 to the present time." The defendant duly excepted to the giving and refusing of the above instructions. The jury returned a verdict for the plaintiff, and assessed the monthly value at ten dollars. The court, by its own decree, vested the title to the land in the plaintiff, subject to a lien in favor of the defendant for the balance due him.

A. J. P. Garesché, for appellant.

Reber, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This case was heretofore in this court, and is reported in 19 Mo. 78. The judgment below was then reversed, and the cause remanded. The present record presents very much the same state of facts; it will not be necessary therefore to make a lengthy statement of the facts now before us, but to refer to the reported case. The plaintiff below again obtained judgment against the defendant, who moved to set the same aside, and for a new trial, which being overruled, he brings the case here by appeal.

In this court, the defendant contends for a reversal of the judgment, because the court below improperly and illegally refused to permit the defendant's counsel to have the opening and the concluding of the case before the jury. And because proper instructions were asked by the defendant and refused by the court, and improper instructions were given by the court.

1. As to the first ground of complaint, we say that is not well taken. "This is a matter depending on the practice and discretion of the circuit or inferior court. In an argument to a jury, the reply may or may not have had an influence on the verdict. If the verdict is such a one as could not have been rendered otherwise, on the law and the evidence of the case, the court below would not have granted a new trial, although the right to conclude had been denied to him who held the affirmative, and

against whom the verdict was rendered; nor would this court reverse a judgment for such a cause." (Wade v. Scott, 7 Mo. 514; 1 Greenl. Ev. § 75 and 76.) The exercise of the discretion of the inferior courts in this matter must produce wrong to the party in the cause, before this court will pretend to revise it.

2. In regard to the instructions refused on the part of the defendant, we also think that there is no well founded objection. The answer of the defendant shows that the transaction in regard to the land in controversy between himself and his brother, the plaintiff, may well be considered in the light of a mortgage. The plaintiff contends it was a mortgage; the defendant, that it was a sale. Now these two brothers might have different views in regard to this matter. The contract or the agreement might be in law a mortgage, although the defendant did not think so when he was making it.

The court instructed the jury "that the defendant claims the land in controversy under a parol contract, which he alleges he made with the plaintiff, with the payment of the purchase money and delivery of possession under it. To sustain the defence, it should appear from the evidence that there was a contract for the sale of the land, as alleged, and what the consideration was, and that it was paid by defendant, and that the possession of the land was delivered or given up to the defendant in pursuance of it; if all this is proven to the satisfaction of the jury, they will find a verdict for the defendant, otherwise the defence of a parol purchase is not made out." This instruction put the defence, as regards the contract, fairly before the jury. The defendant entered the land with the money of his father, at his father's direction; he had made to the plaintiff a deed for the twenty acres in controversy. Now the destruction of this deed, as heretofore laid down in this case by this court, did not reinvest the title to the land in the plaintiff. To get this title back, must be by contract. The defendant sets up this contract. It is not pretended to be in writing, and the court properly states to the jury, under the

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above instruction, what the defendant has to make out by his proof.

This instruction embraced the merits of the defence, and the jury found for the plaintiff. The defendant in his answer states "that at the period of his repurchase, he told plaintiff that, if within a year he could repay to the defendant the amount of purchase money and interest, he would reconvey to him." This in effect makes this transaction a mortgage, and the subsequent statement of the defendant, "that, because this period has long since elapsed, because it was a promise made after the purchase, and without consideration, he should not now be compelled to observe it, and that the same is not binding," can not render it less a mortgage. At the period of his repurchase he told the plaintiff that, if within a year he could repay to the defendant the amount of the purchase money and interest, he would reconvey to him. We must remember that all this matter about repurchase is in parol, that is, not in writing. Then being done at the same period—same time, whether at the end or beginning of the contract, it must be considered as forming a part of it. It must be considered as forming but one contract or agreement, and the legal effect of that is to make the whole a mortgage—a different thing altogether from what the defendant's counsel contends it was. The jury having found for the plaintiff upon an instruction putting the law of the case fairly before them, we can not say that they have been misled.

In regard to the point about the rent, it may only be thought necessary to say that the mortgage debt and interest have been decreed to be paid to the defendant. Now the value of the profits and rents of the premises, in equity and good conscience, should be deducted from the debt and interest. The court directed the jury very properly to estimate the yearly value from a certain period before the possession and up to the beginning of the suit, including the time the defendant was in such possession; not for the purpose of deducting the rent for such time, but in order to ascertain the yearly value correctly, that he, from such estimate, might fairly allow for the time during

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which the defendant had possession according to the yearly value found by the jury ; and hence in this case the damages or value of the rents and profits are charged against the defendant only for the time he had the premises in his possession.

Upon the whole case, this court is of opinion that the judgment of the court below should be affirmed, which, with the concurrence of the other judges, is done accordingly.

HONNICK, Plaintiff in Error, v. PHOENIX INSURANCE COMPANY,
Defendant in Error.

1. Where a policy of insurance, in which *fire* and *ice* are excepted perils, is renewed by an endorsement in which it is stated that it is "understood that the assured is not entitled to claim for any loss or damage arising from *ice*," *held*, that a second renewal by endorsement, in which it is stated that the "within policy is renewed," &c., applies to the original policy and not to the said policy as renewed by the first endorsement. A loss by fire occurring after the second renewal is not covered by the policy.

Error to St. Louis Court of Common Pleas.

This was an action on a policy of insurance, which had been twice renewed by endorsements. The original policy was dated December 11, 1851, and was for one month, "on a lot of brushes, valued at \$4000, shipped on a flat-boat called the *Rough and Ready* No. 5, with privilege of trading down the Ohio and Mississippi rivers, from this date, and with privilege of continuing the policy one or more months upon payment of premium, excluding from this risk all loss or damage arising from fire or from ice." The sum insured was \$2000, at 1½ per cent. premium, \$25. Afterwards, on the 20th of January, 1852, the said policy was renewed for one month, for the sum of \$4000, as appears from the following endorsement: "January 20th, 1852. \$4000. In consideration of a premium of sixty dollars, the within policy is renewed for the period of one month, as is hereinafter stated, and for the sum of \$4000, on

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brushes within described; it being understood that the assured is not entitled to claim for any loss or damage arising from ice," &c. There was also a further renewal by the following endorsement: "Office Phoenix Insurance company, St. Louis, April 12th, 1852. In consideration of the premium of forty-five dollars, the within policy is renewed for one month, commencing on this 12th day of April, 1852, and for the sum of three thousand dollars, on brushes, within described. Prem. \$45. W. H. Pritchard, Sec'y." The plaintiff, after showing that the brushes covered by the policy were destroyed by fire, on the 10th day of May, 1852, during the pendency of the risk last mentioned, and also the extent of the loss, and the value of the brushes, at the time of their destruction by fire, rested his case; whereupon the court, upon the motion of the defendant, gave the following instruction: "The jury are instructed that the policy and proofs introduced by the plaintiff in this cause do not entitle him to recover in this suit, and they will find for the defendant." The plaintiff excepted to the giving of said instruction. Plaintiff then offered and asked leave to prove by parol what in the last renewal of said policy of insurance was the intention of the parties, and that it was their intention to insure against loss by fire, and the court refused to allow plaintiff to make such proof, assigning as a reason for not opening the case after instructions given, that the proposed testimony was incompetent as tending to vary the express terms of a written contract, to which refusal of the court plaintiff at the time excepted. Plaintiff then took a nonsuit, with leave to move to set the same aside; and upon the refusal of the court to set aside the said nonsuit, the cause was brought here by writ of error.

B. A. Hill & D. W. Hill, for plaintiff in error. 1. If the last renewal renewed the policy as it existed at the time of such renewal, then the risk of fire was assumed. The original risk was for \$2000, at a premium of $1\frac{1}{4}$ per cent. per month, on a lot of brushes, and the risks of fire and ice were excepted in the written part of the policy. The new risk was taken on the

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20th January, 1852, still in the winter season, and the premium was increased to $1\frac{1}{2}$ per cent. per month, and the exception of the fire risk was not made, but the exception of losses by ice was retained. This was an express annulment of the original exception of fire, and the policy stood as a full indemnity for all the perils except ice. The winter being over, the new risk of the 12th of April, 1852, was taken without any exception specified in the renewal. The season of ice had passed, and it, the only excepted peril, was not stated as an exception. This last renewal was of the policy as it stood at the time that renewal was made, and ice was not specially excepted in the second renewal for the simple reason that the season of ice had passed. The same premium is paid for the last renewal as for the first renewal; being $\frac{1}{4}$ of one per cent. more than the premium paid for the first insurance. 2. The court should give a liberal construction to this contract, taking into consideration all the surrounding facts and circumstances. (Story on Con. § 640; 1 How. 169; 2 How. 426; 2 W. & S. 546; 13 B. Monroe, 314; 1 Seld. 475.)

Hudson & Thomas and Kasson, for defendant in error, cited 4 Kent's Com. 109, note; Taylor's Land. & Tenant, 157 and 158; 10 Barb. 440; 2 Wood & Min. 472.)

RYLAND, Judge, delivered the opinion of the court.

The question in this case is, what was renewed? The original policy, or the renewed policy as endorsed on the original? There being two renewals, the last one being the foundation of this action. This question is one alone of construction, and we hesitate not to declare that, in our opinion, the last renewal embraces only the original policy as it was first made between the parties, and not the policy as it was first renewed.

The plaintiff contends that the last renewal has reference only to the policy as it was after its first renewal; thereby making, as he says, fire one of the perils insured against. Now, in the original policy, "fire" and "ice" are both ex-

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cepted. Upon the first renewal, "ice" only was excepted. The plaintiff contends that this exception on the back of the policy, excluding "ice" only, and not "fire" and "ice," as was the case in the original policy, made the policy, as renewed for the first time, a policy against fire as well as other dangers therein enumerated, and then contends that the last renewal was but a continuance of the policy as renewed before, consequently not excluding fire as one of the perils.

The terms of the last renewal are as follows: "Office Phoenix Insurance company, St. Louis, April 12, 1852. In consideration of the premium of forty-five dollars, the within policy is renewed for one month, commencing on the 12th day of April, 1852, and for the sum of three thousand dollars, on brushes, within described. Prem. \$45. W. H. Pritchard, Secretary."

On looking to the first renewal endorsed on same policy, I find the subject insured to be "brushes, within described." The second renewal is in general terms. The within policy is renewed "on brushes, within described." Now it is obvious that had the parties intended to renew the renewed policy, they would have chosen apt and proper words to effect that purpose; they would not have said, "the within policy is renewed," and stopped at that. There can be no doubt, it seems to the court, what was meant by this last renewal. It was the original policy, and that excluding fire and ice both; consequently fire was not one of the perils insured against, and the instruction of the court below was proper.

The judgment of the court below will therefore be affirmed; the other judges concurring.

CITY BANK OF COLUMBUS, Respondent, v. PHILLIPS, Appellant.

1. It is a good defence to an action on a promissory note, given as a premium note to an insurance company, that the maker was induced to give the said note by false representations of the solvency of the company, made with intent to deceive; nor is it necessary that those false representations should

20th January, 1852, still in the winter season, and the premium was increased to $1\frac{1}{2}$ per cent. per month, and the exception of the fire risk was not made, but the exception of losses by ice was retained. This was an express annulment of the original exception of fire, and the policy stood as a full indemnity for all the perils except ice. The winter being over, the new risk of the 12th of April, 1852, was taken without any exception specified in the renewal. The season of ice had passed, and it, the only excepted peril, was not stated as an exception. This last renewal was of the policy as it stood at the time that renewal was made, and ice was not specially excepted in the second renewal for the simple reason that the season of ice had passed. The same premium is paid for the last renewal as for the first renewal; being $\frac{1}{4}$ of one per cent. more than the premium paid for the first insurance. 2. The court should give a liberal construction to this contract, taking into consideration all the surrounding facts and circumstances. (Story on Con. § 640; 1 How. 169; 2 How. 426; 2 W. & S. 546; 13 B. Monroe, 314; 1 Seld. 475.)

Hudson & Thomas and Kasson, for defendant in error, cited 4 Kent's Com. 109, note; Taylor's Land. & Tenant, 157 and 158; 10 Barb. 440; 2 Wood & Min. 472.)

RYLAND, Judge, delivered the opinion of the court.

The question in this case is, what was renewed? The original policy, or the renewed policy as endorsed on the original? There being two renewals, the last one being the foundation of this action. This question is one alone of construction, and we hesitate not to declare that, in our opinion, the last renewal embraces only the original policy as it was first made between the parties, and not the policy as it was first renewed.

The plaintiff contends that the last renewal has reference only to the policy as it was after its first renewal; thereby making, as he says, fire one of the perils insured against. Now, in the original policy, "fire" and "ice" are both ex-

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cepted. Upon the first renewal, "ice" only was excepted. The plaintiff contends that this exception on the back of the policy, excluding "ice" only, and not "fire" and "ice," as was the case in the original policy, made the policy, as renewed for the first time, a policy against fire as well as other dangers therein enumerated, and then contends that the last renewal was but a continuance of the policy as renewed before, consequently not excluding fire as one of the perils.

The terms of the last renewal are as follows: "Office Phoenix Insurance company, St. Louis, April 12, 1852. In consideration of the premium of forty-five dollars, the within policy is renewed for one month, commencing on the 12th day of April, 1852, and for the sum of three thousand dollars, on brushes, within described. Prem. \$45. W. H. Pritchard, Secretary."

On looking to the first renewal endorsed on same policy, I find the subject insured to be "brushes, within described." The second renewal is in general terms. The within policy is renewed "on brushes, within described." Now it is obvious that had the parties intended to renew the renewed policy, they would have chosen apt and proper words to effect that purpose; they would not have said, "the within policy is renewed," and stopped at that. There can be no doubt, it seems to the court, what was meant by this last renewal. It was the original policy, and that excluding fire and ice both; consequently fire was not one of the perils insured against, and the instruction of the court below was proper.

The judgment of the court below will therefore be affirmed; the other judges concurring.

CITY BANK OF COLUMBUS, Respondent, v. PHILLIPS, Appellant.

1. It is a good defence to an action on a promissory note, given as a premium note to an insurance company, that the maker was induced to give the said note by false representations of the solvency of the company, made with intent to deceive; nor is it necessary that those false representations should

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be actually made to the maker of the note himself ; any false and fraudulent representations held out and made to the world at large for purposes of deception, as by the public statement of the condition of the company, and relied upon by the maker of the note, will constitute a good defence.

2. Notice to several directors of a bank, taking a note by endorsement, of fraud in the consideration of the note, is notice to the bank. Such notice may well be presumed, where some of the directors of the bank are also directors of an insurance company, by whom the note was endorsed to the bank, and in whose hands the note was void for fraud.

Appeal from St. Louis Court of Common Pleas.

The facts appear in the opinion of the court.

Hudson, for appellant.

Drake, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was an action by the city bank of Columbus on a negotiable note, dated May 1st, 1851 ; it was a premium note, given for the insurance on a steamboat. The bank took the note on discount in the usual course of business. The defence set up in the answer was that the Columbus insurance company was insolvent, and fraudulently entered into the contract of insurance ; that by reason of the fraud the contract was void, and the insurance company acquired no right to recover upon the note, and that the city bank of Columbus, when she took the note, knew this. The note was executed to James M. Clendennin, the agent of the Columbus insurance company, dated 1st May, 1851, and payable six months after date. The note was endorsed by Clendennin, the agent, to the Columbus insurance company, and was by the company discounted at the bank, the plaintiff in this action.

On the trial, the defendant offered evidence tending to show that the Columbus insurance company was wholly insolvent at the date of the issuing of the policy and of the note ; that the same persons who controlled the bank also controlled said insurance company ; that the directors, or a portion of them, were stockholders and directors in both institutions, and knew

of the utter insolvency of the insurance company at the date of said note; also evidence of the false statement filed by the insurance company in the office of the clerk of the county court at St. Louis, and the false statement made by the published condition of the insurance company, and that defendant had read said statement before taking out said policy of insurance; that long before the maturity of said note, the insolvency of said insurance company became notorious, and the company ceased to do any business, and never paid any losses thereafter; that the company failed for several hundred thousand dollars over the assets. There was no proof that Clendennin, the agent, knew that the insurance company was insolvent at the time of giving the policy and taking the note. The following instruction, among others, was given for the plaintiff: "If the jury believe from the evidence that the plaintiff acquired title to the note sued on before it became due, and for a valuable consideration, then the defendant, in order to avail himself of the insolvency of the Columbus insurance company, as a defence to this action, must prove to the satisfaction of the jury the following facts: That said company, when said note was given, was, and knew itself to be, insolvent, and unable to fulfill the contract of insurance, on account of which said note was given; that said company, knowing itself to be insolvent and unable, induced the defendant to give said note, by false representations of its solvency, actually made to him, for the purpose and with the intent fraudulently to deceive him, and induce him to give said note; and that the plaintiff, when it acquired title to said note, knew for what it had been given, and that it had been obtained from the defendant by means of such false representations, actually made by said company, with such fraudulent intent." And also the following was asked by defendant, but was refused: "If the jury believe from the evidence that the note sued on in this case was given for a premium of insurance effected by the Columbus insurance company for said defendant, and that at the time the said insurance was effected and note given the said insurance company was insolvent, and that

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its insolvent condition was at that time and as early as the first day of January, 1851, known to the officers and directors of said insurance company, or some of them, and that the said insurance company made statements and exhibits of its condition on the first day of January, 1851, which were false, and known to be so by its directors or some of them, and that the statement of the condition of said company, given in evidence by defendant, was filed in the office of the clerk of the county court of St. Louis county, as early as 8th February, 1851; and if the jury further find that the note in question was transferred by said insurance company to plaintiff, and that at that time the directors of said plaintiff, or some of them, knew for what consideration said note was given, and had knowledge that at the time said note was given the said insurance company was insolvent, and that it had made, prior to the date of said note, such false and fraudulent misrepresentations, then the plaintiff can not recover."

1. This instruction, given for the plaintiff, is erroneous. The court here tells the jury that the defendant, in order to avail himself of the insolvency of the Columbus insurance company, (if the jury believe that the plaintiff acquired title to the note sued upon, before it became due, and for a valuable consideration,) as a defence to this action, must prove, to the satisfaction of the jury, the following facts, to-wit: "That said company, when said note was given, was and knew itself to be insolvent and unable to fulfill the contract of insurance, on account of which said note was given; that said company, knowing itself to be so insolvent and unable, induced the defendant to give said note, *by false representations of its solvency, actually made to him for the purpose and with the intent fraudulently to deceive him, and induce him to give said note*; and that the plaintiff, when it acquired title to said note, knew for what it had been given, and that it had been obtained from the defendant by means of such false *representations, actually made by said company with such fraudulent intent.*" Surely the law does not require that the false representations

must be actually made to the party himself, in order to avoid the note. Any false and fraudulent representations held out and made to the world for the purposes of deceit and deception, by which the defendant becomes imposed upon, and on account of which he comes under an obligation to the party making such, would, in law, discharge him from such obligation, would be a fraud upon him, though he had never been spoken to by the party making these representations. It is enough if he was entrapped by them, and that they were designed to entrap some one. This instruction, then, did not lay down the law correctly, and for this the case must be reversed.

2. The same persons or a portion of them control both institutions, the bank and the insurance company. The insurance company becomes insolvent—hopelessly unable to pay for any losses. That company make false publications as to its condition and ability to pay. It also files, under the statute law of this state, a statement of its condition with regard to its means and liabilities. This our law requires, because the company has its agent here doing business for it. This statement is to be filed with the clerk of the county court of St. Louis county. This statement should be honestly and truly made. This statement, filed by the company in this case, was proved to be false. Now it is but a reasonable presumption that what one of these companies or institutions does, is known to the other; that the condition of each is known to the other. The same directors, or a portion of the directory and stockholders in each is the same. Notice, therefore, may be well presumed against the bank. “It is a well established principle, both in law and equity, that notice to an agent in the transaction for which he is employed, is notice to the principal; for otherwise, where notice is necessary, it might be avoided in any case by employment of an agent. The rule applies equally to a corporation as to a natural person. In case of a joint agency as of directors of a bank, knowledge of a material fact, imparted by a director to the board at a regular meeting, is notice to the bank. Notice to either of the directors, *whilst engaged in the busi-*

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ness of the bank, is notice to the principal, the bank." (Angel & Ames on Corporations, 299 ; 2 Hill, 451.) Apply this principle here, and if the directors of the insurance company knew that the company was insolvent, that it had made false statements—false publications of its situation, and thereby induced persons to take policies of insurance and execute to the company notes for the premiums, when it was utterly unable to pay for any losses that might happen, then assign over these premium notes, or have them discounted at a bank where the directors are, in part, the same men who manage and control the insurance company, and I see no reason why a knowledge of the fraud of the insurance company may not be carried home to the bank upon any note of the premium notes thus obtained. The bank should not discount notes taken by the institution which is known to the bank to be hopelessly insolvent. There is here in proof such connection between these two institutions, such a unity in the controlling power of the two, so broad a connection, that notice can well be imagined passing from one to the other of all the transactions of both.

The instruction prayed for by the defendant, in the opinion of a majority of the judges, was improperly refused. It should have been given. For the errors aforesaid, in giving and refusing instructions above pointed out, the judgment below is reversed, and the cause remanded ; Judge Scott concurring.

DEANE, Appellant, v. TODD *et al.*, Respondents.

1. Where an assessment of a tax has been made by the assessor, and the party upon whose property the assessment has been made fails to make complaint, in respect to any error in the assessment, to the court of appeals when sitting for the correction of such errors, and the tax-books are made out and are delivered to the collector ; *held*, that the ordinary judicial tribunals have no authority to stay the collection of the tax at the suit of the tax-payer. The law has provided a special tribunal for the correction of errors in the assessment of taxes, and to that resort must be had. (Scott, J., dissenting.)

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Appeal from Washington Circuit Court.

Plaintiff filed his petition in the Circuit Court of Washington county, praying that Todd, the sheriff and collector of said county, might be enjoined and restrained from collecting a certain tax alleged to have been improperly assessed against the plaintiff, and also praying that the county court of said county be directed to set aside and annul the assessment of said tax. It appears from the finding of the court, that on the 1st of February, 1854, the plaintiff was a resident of Washington county; that on that day he held a note or bond on the Potosi lead company for \$72,300, to fall due October 1st, 1854, it drawing interest from its date. The Potosi lead company, as a corporation, was entirely insolvent on said 1st of February, 1854; but many of the individual members of the said corporation were entirely solvent. It is alleged in the petition, and not denied in the answer, that the only security the plaintiff had for the payment of the said sum of \$72,300, was a mortgage of a certain tract of land which was assessed by the assessor of said county at \$1,000. It is also found by the court that the plaintiff removed from the state of Missouri in April or May, 1854, he fixing his residence thereafter in the state of New York, and leaving one John Dean, jr., as his agent. After plaintiff had left the state, the assessor called upon John Dean, jr., the agent, for a list of plaintiff's property, and he gave to the assessor a list which did not contain the above note and mortgage for \$72,300; which was afterwards added by the assessor and assessed at its apparent value. It is alleged in the petition, and not denied in the answer, that the plaintiff was returned by the assessor as a non-resident, and that his property was put upon the non-resident list; that neither the petitioner nor his agent were in the state at the time the court of appeals for said county was held, nor at the time notice was given of holding said court, and that they had no notice that the note had been added to the list handed to the assessor by plaintiff's agent, until after the court of appeals had passed, and the tax-books

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had been handed to the collector. The plaintiff, upon learning of the said assessment, after the adjournment of the said court of appeals, applied to the county court to be relieved from the payment of the same. His application was refused, and thereupon the present suit was brought.

Frissell, for appellant. 1. The debt of \$72,300 was not taxable for the reason that the Potosi lead company was insolvent. (Sess. Acts, 1849, p. 113.) 2. The reason for not applying to the court of appeals is sufficient. (R. S. 1845, p. 934, sec. 33.)

Perryman & Carter, for respondent. 1. The plaintiff has lost his remedy by permitting a term of the court of appeals, regularly advertised and held according to law, to pass, without making any complaint against the assessment. He has lost his remedy by his laches. (2 Sto. Eq. 895, 896.) 2. The plaintiff being a resident of Washington county, February 1st, 1854, the note was a proper object of taxation. (R. S. 1845, p. 931, 932, § 10, and 21; Sess. Acts, 1849, p. 112, 113.) 3. The fact that the Potosi lead company, as a corporation, was insolvent, did not make the said note an improper object of taxation. The individual corporators were solvent and liable. (R. S. 1845, p. 233, § 13.) 4. It does not matter that the property of plaintiff was put upon the non-resident list, as he was a resident of Washington county, February 1st, 1854.

LEONARD, Judge, delivered the opinion of the court.

Assuming, for the purpose of the present case, that the plaintiff ought not to have been taxed on account of the debt due him from the Potosi lead company, the assessment was not therefore void, so that the tax-book, delivered to the collector, conferred no authority upon him to collect the amount standing there against the plaintiff. It was at the utmost only erroneous, and for the correcting of such errors the law had provided a special tribunal, and directed the assessor's book to remain in the county court clerk's office, open to the inspection of all

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persons interested, for ten days preceding the opening of the court of appeals. After the appeals are heard and determined, the tax-book is made out from the corrected book of the assessor and delivered to the proper officer, and it is his duty to collect the sums there specified, from the persons upon whom they are assessed; and for that purpose he has the same power to sell personal property that is conferred by an execution at law. It can not be maintained that the ordinary judicial tribunals have authority to stay the collection of a state and county tax, at the suit of a tax payer, upon the ground of an excessive or otherwise erroneous assessment. It was fit that a remedy should be provided to correct the errors of the assessor, but the necessities of the case required that it should be a speedy and summary one, and such a remedy has been accordingly provided, and must be considered as exclusive. If the party omitted to appeal, it was his own fault or misfortune and not the fault of the law; and if he was deprived of his appeal by the improper conduct of the assessor, this might be a ground for holding the officer responsible for the loss occasioned to the plaintiff; but it would furnish no ground for the courts to stop the collection of the tax until the propriety of it could be heard and determined in a suit instituted for that purpose, between the tax payer on the one side, and the collector and judges of the county court upon the other. If the assessment against the plaintiff could be considered as a nullity, conferring no authority upon the assessor to sell the personal property of the plaintiff, the remedy of the party would be to sue the officer for the trespass, and disregard the pretended title of the purchaser. So that, either way, there is, we think, no ground for this suit. The assessment may be erroneous; but if it be, we can not remedy it without overturning fundamental legal principles, and the party, therefore, must apply elsewhere for relief.

Judge Ryland concurring, the judgment is affirmed.

SCOTT, Judge. Several late cases have given the relief sought by the appellant and plaintiff in this proceeding. We

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have acted on the principle that relief would be given by injunction where an attempt was made to collect a tax not due by law. For some years this jurisdiction has been exercised without question. The point was raised and ably argued in the case of *Ferguson v. The City of St. Louis*, and it was solemnly decided that bills praying for relief under such circumstances should be entertained. Since that time, which was some six or more years ago, no question has been raised as to the jurisdiction of our courts in such cases. The case referred to has not been reported. I see no reason why that practice, thus sanctioned, and which has led to no inconvenience, should be departed from in this instance, unless the extreme severity of the case should be made the foundation of the exception. Here, a sum amounting to nearly a thousand dollars, not one cent of which is due by law, is attempted to be extorted from a citizen under a pretence of right.

I have always thought that the ground on which courts of equity, in some of the states, refused to interfere in such cases, was that the remedy was complete at law, inasmuch as the officer collecting such a tax would be a trespasser, and no title would pass to any property he might sell. To put it on the ground that the assessment is merely erroneous, and if the tax payer fails to take his appeal, he is without remedy, is to make an assessor a court of general jurisdiction, whose assessments, equalling judgments in point of force, can not be impeached in a collateral proceeding — a principle which would lead to such oppression and injustice as would appal the most hardy. The case under consideration fully illustrates the evil tendency of the principle maintained. The plaintiff here, in obedience to the requirements of the law, furnished the assessor with a list, of his taxable property which was correct. The assessor, without informing the tax payer of his conduct, disregards the list and assesses him, in the teeth of the statute, with some seven or eight hundred dollars, on a debt due him by an insolvent corporation. As the tax payer was not informed, as he should have been by the assessor, that his list was disregarded, as he

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was not delinquent, inasmuch as he had done every thing required of him by law, why should he lose his rights because he did not appeal, when it was impossible for him to do so, as he was prevented by the illegality of the conduct of the assessor? In my opinion, the judgment should be reversed.

DESSAUNIER AND OTHERS, Appellants, v. MURPHY, Respondent.

1. Where parties have been under disabilities so that their title to land, held adversely, has not been barred by the operation of the statute of limitations; held, that their failure to object to the adverse occupation, and to the making of improvements, &c., will not estop them from setting up title.
2. The presumption of a deed of conveyance from facts and circumstances, without the production of the instrument or any direct proof of its existence, and which juries are sometimes permitted, and, if the facts warrant, directed to draw, is a disputable presumption and not a conclusive presumption, or *presumptio juris et de jure*.

Appeal from St. Louis Land Court.

This was an action in the nature of an action of ejectment to recover possession of an undivided one-fifth part of a tract of about forty arpens, situate in the Grand prairie common field, near St. Louis. The land claimed was part of United States survey No. 1589, under a confirmation by act of congress of 29th April, 1816, to "William Bizette or his legal representatives." Plaintiffs claim title as the legal representatives of William Bizette. Defendant, in his answer, traverses all the allegations of the petition, except that he admits being in possession of a part of the land sued for, to which he asserts title and ownership in himself; also sets up the statute of limitations as a bar to a recovery. Upon the trial, it appeared in evidence that the land sued for was confirmed to William Bizette's representatives by act of congress of April 29, 1816; and surveyed for said representatives, September, 1838, by United States survey No. 1589; that at a public judicial sale

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of the estate of Wm. Bizette, then deceased, his brother, Chas. Bizette, became the purchaser of the property in controversy, and a deed dated February 18, 1775, was made to him, conveying the same; that before this sale, said Charles Bizette had married one Mary Papin, under a previous marriage contract, in which, among other things, it was stipulated that the parties thereto should "be one and common in all property moveable, and in acquisitions immoveable, conformably to the custom established in this colony," &c., and that "the said future consorts take each other with the property to them actually belonging, and that which may come to them in the future, and with all acquisitions and gains, either of moveable or immoveable, which property, from whatever side it might come, and in whatever place it may be located, shall enter entirely into the community, without exception or reserve;" that Charles Bizette died in the year 1780, leaving him surviving his wife Mary and three children, born at St. Louis, to-wit: Mary Louise, Paul and Antoine; that the said Mary, widow of Chas. Bizette, married John B. Provenchere in the year 1781, and died January 22d, 1819; that said John B. Provenchere died about 1819 or 1820, the said Provenchere and wife living in the vicinity of St. Louis; that said Mary Louise Bizette married Louis Boisse in the year 1795, and died in the year 1813, the said Louis dying October 12, 1819; that the said Mary Louise and Louis Boisse had five children, Emily, (the plaintiff, Emily Dessaunier,) Louise, (the plaintiff, Louise Deroine,) Margaret, (mother of the other plaintiffs,) Baptiste and Louis; that the said Emily was born in May, 1799, and was married to J. B. Gaignon, June 22d, 1818, who died about nineteen or twenty years before the trial; she afterwards married one Dessaunier, since deceased; that the said Louise Boisse (plaintiff) married Francis Deroine, October 27, 1819, about twenty-two or twenty-three years before the trial, who died three or four years before the trial; that she was fifty years old at time of trial; that the said Margaret Boisse married Paschall Mallette, October 17, 1812, and died about twenty years before the

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trial, leaving the following children, to-wit: 1. Paschall Mallette, (one of the plaintiffs,) aged 34 or 35 years at time of trial; 2. William, (also one of plaintiffs,) aged about 34 or 35 years at time of trial; 3. Frederick, (one of plaintiffs,) dead about nine months before trial; 4. Louis (plaintiff) aged at same time about 20 years; 5. Charles (plaintiff), aged at same time, 35 or 36 years; 6. Francis (plaintiff), aged at same time about 21 or 22 years; 7. Lize, who died about 22 years before the same time, leaving a child, who, soon after the death of its mother, was taken to France by its father, and had not been heard from for seven or eight years.

The defendant introduced in evidence archives No. 2371 and 2590. Archive No. 2371 purported to be an inventory taken in August 18, 1781, of the effects of the estate of Charles Bizette, deceased, taken under the authority of the lieutenant governor, upon a petition of the widow of said Bizette, praying that an inventory might be taken and the effects sold for the payment of debts and for the benefit of the children of the said Bizette, the widow being about to marry again. The tract of land in controversy was included in this inventory. Archive No. 2590 purported to be sale of the effects of Charles Bizette, deceased, under an order of and in the presence of lieutenant governor Cruzat. This sale took place September 17th, 1781, and was on a credit of one year. In the list of effects sold, there is no mention of the land in controversy in the present suit, or of any real estate. This archive also tended to show that John B. Provenchere, (who afterwards married the widow Bizette,) was appointed guardian and curator of the minor children of Charles Bizette, and authorized as such guardian and curator to take charge of all the effects of Charles Bizette. Defendant then offered in evidence a deed of J. B. Provenchere and Marie Christine, his wife, dated May 4th, 1811, to Joseph Brazeau, purporting to convey the land in controversy. In this deed, it is recited that Joseph Brazeau had purchased the said tract at the public sale which had been made after the decease of Charles Bizette; that the said conveyance was made in con-

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sideration of the sum of forty dollars, which had been paid by the said Brazeau, "as is evidenced by the receipt annexed to these presents," which annexed receipt is as follows: "I, the undersigned, give a full discharge of Mr. Brazo of the sum which he owes to the estate of the late Vizet, for a piece of land which was sold to him at public sale. St. Louis of Illinois, October 12, 1782. 200 livres, or \$40.

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"PROVENCHERE."

Said deed was recorded June 18th, 1811. There was also offered in evidence a deed of the said Joseph Brazeau, dated June 18, 1811, to Auguste and Louis Brazeau, of the land in controversy, acknowledged and recorded same day; also a deed dated August 13, 1818, recorded August 15th, 1818, of Auguste and Louis Brazeau, to Angus L. Langham, purporting to convey the land next south of that in controversy in the present suit. In this deed, the land conveyed is bounded north by Angus L. Langham. There was also evidence tending to show that Langham went upon the land in the fall of 1818, in October or November, and built a house and made enclosures upon it, and that the land had been claimed through him since then to the present time, and that it had been in possession of some one since Langham left it, claiming through him, except for a year or two, say from 1828 to 1829, when it was not known whether any one was upon the place or not. The following instruction asked by defendant, was given by the court: "If the jury believe from the evidence that Charles Bizette purchased the land in controversy at a public sale of the estate of William Bizette, on or about February 18th, 1775; that before its purchase he was married to Mary Papin, in pursuance of the contract therefor read in evidence; that after this sale, and about May 26th, 1780, said Charles died, leaving the said Mary his widow, and a daughter, Mary; that afterwards said widow was married to John Bte. Provenchere, and the said Mary to Louis Boisse; that said Provenchere was made guar-

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dian of the children of Charles Bizette; that they all afterwards continued to live in this vicinity, until their deaths, as given in evidence; that as early as 1811, the said Provenchere and the said Mary, as his wife, made a deed, conveying said tract to Joseph Brazeau, under a claim by him (Brazeau) and admitted by said Provenchere and said Mary, his wife, of having purchased it at a public sale of the estate of Charles Bizette, and that said claim and admission were inserted in said deed; and that said deed was recorded in the records of deeds for the county of St. Louis, in the same year; that said Brazeau, in the same year, conveyed said tract by a deed of warranty unto Auguste and Louis Brazeau, and that this deed was also put upon said records in the same year; that afterwards and as early as 1818, said Auguste and Louis admitted in writing that Angus L. Langham was the owner of said tract, and that said admission was put upon said records in the same year, 1818; that said Langham, in the same year, entered into the possession thereof, and made substantial and costly improvements thereon, and that this tract has ever since been possessed and improved adversely to all others by said Langham and those claiming by, through or under him, and that defendant claims through him, said Langham, the possession of the portion thereof that he has in possession, then the jury should presume a good title in the defendant of the part of said tract he is possessed of, and find for the defendant." To the giving of this instruction plaintiffs excepted. The following instruction was asked for by the plaintiffs and refused by the court: "Although the first instruction asked by the defendant and given by the court states that the jury should, under a state of case therein set out, presume a good and valid title in the defendant, yet this presumption is a mixed question of law and fact; the court has decided in the said instruction given, what is conceived to be the law, and it is for the jury to decide the facts; now if, with all the testimony and circumstances in this case, as submitted to the jury, they shall be of opinion that the land in dispute was not sold at public sale in 1782, after Chas.

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Bizette's death, to Joseph Brazeau, and if the proof does not satisfy the jury that Charles Bizette or his legal representatives, conveyed this land, and that there was no possession of it until in 1818 it was taken possession of by Langham, they are at liberty to come to a different conclusion than the one they are directed to make by said instruction given for defendant, and may, under other instructions, find for the plaintiffs or defendant, as the proof may justify." To the refusal of the court to give this instruction plaintiffs excepted. There were others asked by the plaintiffs and refused by the court, which it is unnecessary to set them forth, as all the questions discussed turn upon the giving of the instruction above set forth. The plaintiffs took a nonsuit, with leave to move to set the same aside; and a motion to that effect was made and overruled. This suit was instituted September, 1853, and the trial was had November 27, 1854.

Williams and Morehead, for appellants. 1. Presumption of title cannot spring up in a case like this. There was no deed and no possession upon either of which to base a presumption. For the doctrine of presuming title or rather of presuming deeds, the court is referred to 1 Greenl. Ev. § 46, 47, 48; 1 Cow. & Hill's notes, 355, note 311. 2. When Langham first entered into possession of this land, the plaintiffs were under disabilities which continued, so that they could not be barred by the statute of limitations. If so, they could not be presumed against. (1 Cow. & Hill, 356; 4 J. J. Marsh. 516-27; *Sumner v. Child*, 2 Conn. 614-20; 11 How. 329.) Suppose there had been no possession of the land until now, could title be presumed in Langham or his representatives? If not, how can it be presumed as against those under disability? The disability to sue destroyed all presumption as to one under it, and the title stands just as if there had been no possession. 3. The instruction given is wrong under any view of the law. It professed to refer the facts to the jury, while it decided the case for the defendant. The refusal to tell the jury what to do, provided they did not find the facts as set out in the in-



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struction, is tantamount to shutting out the plaintiffs altogether. Let all the facts assumed in the instruction given be true except the long possession, and where would be the title? Would the facts assumed in the instruction have been sufficient to authorize the presumption of a perfect title in Langham, when he took possession in 1818? Certainly not. How then can such title be now presumed, when those against whom he has been holding have been under disabilities, created by our statute of limitations?

Todd & Krum, for respondent. 1. The instruction given was warranted upon the principles of legal presumptions and of estoppel. (1 Greenl. Ev. § 14 *et seq.*; 1 White Rec. 15, 16; 10 Mo. 312; 17 Mo. 207-360; 1 McLean, 69; 2 Hawks, 233.) At the date of the deed of Provenchere and wife to Brazeau, (May 4th, 1811,) Mrs. Provenchere was entitled to one half of the land conveyed, by virtue of the marriage contract with her former husband, Charles Bizette, said contract having established a community between the parties thereto as to the property in controversy. If the recital in this deed be true, then Brazeau became the owner of said land in 1782, at the public sale of Charles Bizette's estate. That said recital is true is a matter of legal presumption under the evidence. Although the report of the judicial sale omits to show a sale of this property, this does not disprove it. Brazeau had nothing to do with the report, and should not be prejudiced by the omission. Provenchere had power, as guardian and curator of the children of Charles Bizette, under the approbation of a proper officer, to sell real estate of his wards. (1 White Recop. 16.) Against all the plaintiffs the statute of limitations had been running for nearly twenty years before the commencement of this suit, and during all this time, as well as for more than ten years before, the defendant and those he claims under had notorious possession of the land in controversy, were improving it, and claiming it as their own, under deeds publicly recorded and under purchases, both ordinary and judicial, and without objection on the part of the plaintiffs; they should therefore now be adjudged estopped from claiming it.

LEONARD, Judge, delivered the opinion of the court.

The substantial question here is, whether the facts recited in the instruction the court gave, constitute, in point of law, a title to so much of the land sued for as had been in the actual possession of Langham and those claiming under him, since he first took possession in 1818. The court directed the jury that, if the recited facts existed, "they should presume a good and valid title in the defendant," and we understand this to mean that, from these facts, the law raised a conclusive presumption of title, dispensing with any further corroborating circumstances, and forbidding all opposing proof—" *presumptio juris et de jure*"—and not a mere disputable presumption of law, which, although deduced by the law itself, and declared to be *prima facie* evidence of the fact, might be met and repelled by contrary proof. This conclusive presumption, it is said, is not a rule of inference from testimony, but a rule of protection adopted by the law as expedient and for the general good, attaching itself to the circumstances, when proved, and not deduced from them.

In reference to the natural presumptions to be drawn by a jury accordingly as their consciences may be satisfied of the fact, we remark that juries are frequently advised to presume conveyances, although at the same time left free to act according to their own convictions of the truth (1 Greenl. Ev. secs. 46-48); and it might, perhaps, be insisted here, that this is the extent to which the present instruction goes, amounting only to advice; but it has been otherwise argued before us, and we suppose was not so understood in the court where it was given.

The title admitted to have been originally (in 1782) in the ancestor of the plaintiffs, must be considered as still in her and her descendants, unless it has been divested in some lawful way. The court, when the cause was tried, declared that the facts stated in the instruction had that effect, and this must proceed either upon the ground of an estoppel or of a legal presumption, conclusive against the other party of some lawful

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transfer of the title on his part, by which he is concluded, no matter how the fact may, in truth, have been.

In reference to the estoppel, we shall only remark that we do not think the omission of these parties, since 1811, to claim the lot, estops them from now exercising their original rights, even admitting that a conveyance was then made and put upon the record by the mother and former guardian transferring the lot to another, upon the alleged ground stated in the deed of a previous official sale, made in 1782; and that, in 1818, those claiming under this conveyance took possession of the lot and have since made costly improvements upon it, the plaintiffs and their ancestors residing all the time in the neighborhood. What effect all these circumstances ought to have with a jury in raising a presumption that the former owners have in some lawful way parted with their title, is another question; but no court, we think, has ever yet ventured to declare that what is here relied upon would amount to an estoppel, and we are not bold enough to do so.

We remark that the advice given to juries, to presume conveyances between private individuals in England, as stated by Tindall, Chief Justice, in *Doe v. Cooke*, 6 Bing. 179, is confined to cases "where a title has been shown by the party who calls for the presumption, good in substance, but wanting in some collateral matter necessary to make it complete in point of form." The advice, to presume conveyances from trustees to the lawful owners, reconveyances of satisfied mortgages and conveyances from old to new trustees, are instances of the application of the rule in England. The American cases, however, have, no doubt, gone beyond this, and advised juries to presume conveyances in cases where, from long acquiescence on the part of the original owners in the adverse enjoyment of the property by others, connected with other corroborating circumstances, it is fair to presume, in point of fact, that their possession had a legal commencement. (*Sumner v. Child*, 2 Conn. 628; *Clark v. Fanee*, 4 Pick. 245; *Farrar v. Merrill*, 1 Greenl. (Maine) 17; *White v. Loring*, 24 Pick. 322.)

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These, however, are generally mere natural presumptions— inferences of fact, that a legal conveyance has been made, to be drawn by the jury, without the production of the instrument or any direct proof of its existence, from the facts and circumstances that the law allows to be given in evidence for that purpose, and which, if satisfactory to their consciences, is a sufficient warrant in law for their finding accordingly. And in all such cases, it is obviously first a question for the court whether the circumstances offered in evidence are sufficient, in point of law, to submit the question as a matter of fact to the jury, and afterwards for the jury to determine whether they are sufficient to satisfy them of the fact to be inferred. We remark also, that the circumstances may be such that the law will deduce from them a presumption of right in the possessor, either conclusive or only *prima facie*, to prevail until overcome by contrary proof.

The present instruction, going the length of declaring that, if the facts there specified are true, the jury ought, from these facts alone, without reference to any thing else, to find a valid title in the defendants, we all think is erroneous, and that, for this reason, the judgment must be reversed.

We have already stated that these facts do not conclude the plaintiffs, by way of estoppel, from exercising their original rights, nor furnish a conclusive presumption of the transfer of their rights in some way or other to the defendants. The title here relied upon by the defendants, originated, it is said, in 1782, in an official sale of the property of the father's succession; but it is remarked that no actual possession appears to have been taken under the purchase until at least as late as 1818; and it may also be assumed, for the present purpose, that this possession did not confer a title by the statute of limitations, on account of the disabilities of the original owners. Mere possession, unaccompanied by other circumstances, can not afford a conclusive presumption of title, unless continued for the length of time and under the circumstances prescribed by the statute of limitations, (when it has that effect

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by mere force of the statute, as a conclusive presumption, declared by the legislature,) although, when connected with other circumstances, it may justify a jury in presuming a conveyance, or the court in deducing a legal presumption of the transfer of the right, according to the character and weight of these circumstances. In the present case the material fact, beside "the long continued possession," is the alleged sale made or completed by the guardian of the ancestor about 1782, and the payment at that time of the purchase money, evidenced by the receipt recited in the deed of 1811; and if this fact were established, it might then be proper to advise a jury to presume a conveyance of the title, from any proper party, pursuant to and in confirmation of the sale, even against married women; or the court, it may be, would be warranted in deducing a legal presumption of some transaction, sufficient to pass the formal title. Here, however, the fact of sale is not one of the facts from which the presumption of title is drawn; that matter is not submitted by the instruction to the jury. We are, however, not to be understood as saying that the fact of sale could not be inferred by a jury, from the circumstances in the case, or, indeed, that it ought not to have been presumed, if, as is insisted, the receipt was executed at the time of the transaction; but all we now declare is, that the facts stated in the instruction do not afford a conclusive presumption of title; so that it was the duty of the jury, if they found these facts to exist, so to pronounce.

The judgment is reversed, and the cause remanded, all the judges concurring.

TAYLOR Appellant, v. CITY OF CARONDELET, Respondent.

1. The trustees of the town of Carondelet were empowered, by the act of February 6, 1839, (Sess. Acts, p. 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that

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might be proper for that purpose;" *held*, that under this act the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for nonpayment of rent reserved, and that such forfeiture, when declared in proper form, could not be relieved against, although no demand of rent had been previously made. The corporation, in its political capacity, having required the insertion in the lease of the clause of forfeiture, it is as though it had been done by the legislature. (LEONARD, J., dissenting.)

Appeal from St. Louis Land Court.

The incorporated town of Carondelet was proprietor of a large tract of land, consisting of several thousand acres, granted to the inhabitants as a common in Spanish times, and confirmed to them by the United States. The general assembly of this state by act of February 6, 1839, (Sess. Acts, p. 210,) empowered the trustees of the town to grant leases of this land, renewable forever, reserving rents. The board of trustees was by this act clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose." On the 12th day of January, 1845, the trustees of Carondelet passed town ordinance No. 78, directing a sale of lots in survey No. 3, and that the purchaser should pay two per cent. on the amount bid, as an annual rent for ninety-nine years, and four per cent. forever afterwards. The fifth and sixth sections of this ordinance are as follows: "Sec. 5. The leases shall contain a provision to the following effect, viz: That, should the rent reserved as aforesaid, or any part thereof, on any lease, remain unpaid for six months after the same shall become due, the board of trustees may, by resolution, declare such lease terminated and void, and the same shall expire and be determined from that day." "Sec. 6. The leases provided for in this ordinance are to contain all the conditions and provisions which the board of trustees may think necessary, to secure the rent as aforesaid." Under this ordinance, the trustees leased to one Burnet lot 72, in survey 3, containing about ten acres, at the yearly rent of four dollars and ninety-nine cents, payable on the 4th of

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April. This lease expressly referred to the town ordinances, and contained the following clause: "And it is further covenanted and agreed by and between the parties aforesaid, that if at any time the rent aforesaid for six whole months shall be in arrear and unpaid, the said parties of the first part, or their successors in office, may terminate this lease by order or resolution, to be entered on record among the acts and proceedings of the said board, and may enter and take possession of the demised premises, free from any claim of the delinquent lessee, his executors, administrators or assigns." On the 15th of March, 1849, Bennet acquired the leasehold interest by mesne assignments under Burnet. On the 8th May, 1852, Bennet conveyed an undivided moiety to Camden. Neither Burnet nor any claiming under him ever made any improvements on the lot, nor did they even take actual possession; it lay wholly unenclosed and unoccupied. In 1851, the town of Carondelet was erected into a city, with enlarged limits, embracing the leased premises. The powers of the old town trustees were vested in the new city council. The rent under the lease for the years 1850 and '51, was wholly unpaid. On the 10th July, 1852, the city council terminated the lease by resolution, in proper form. In the fall of 1852, Bennet and Camden applied to the city council to repeal the resolution, making, at the same time, a tender of the said rent, taxes with interest, and costs. The application was denied by the council. In this state of things, on the 17th day of January, 1853, and on the 2d March, 1853, Taylor, the plaintiff, became the purchaser of Bennet's and Camden's interest. He then commenced an action by petition in St. Louis Land Court, praying that the said resolution of forfeiture may be rescinded and annulled on the terms of his paying the back rents with interest and costs. The court below, upon the foregoing facts appearing on the trial, refused relief and dismissed the petition. The plaintiff has brought the case here by appeal.

Reber and Carroll, for appellant. 1. The indenture executed to Burnet is a lease, and established the relation of landlord

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and tenant, with all the incidental rights and duties; it was not a sale. See Sess. Acts, 1839, p. 210; Ordinance 78 (of Carondelet). 2. The plaintiff is entitled to the relief prayed, upon the well settled doctrine that courts of equity will relieve a tenant who has forfeited his estate by the nonpayment of rent at the appointed time. (2 Sto. Eq. p. 545; 2 Platt on Leases, 475, 477; Comyn's Land. & Ten., 4 vol. Law Lib. p. 322; 2 White's Lead. Cas. in Equity, 70 Law Lib., 458; Platt on Con. 253; Wadman v. Colcraft, 10 Ves. 67; Sanders v. Pope, 12 Ves. 289; Bowser v. Colley, 1 Hare, 126.) This relief is not granted on the ground of mistake, fraud or accident, but upon the broad equity that the tenant shall not suffer when he is willing and able to make the landlord whole. (2 Sto. Eq. p. 554; also 18 Ves. 58.) 3. The plaintiff then is entitled to relief unless his situation is different from that of ordinary tenants. The inhabitants of Carondelet were the absolute owners of their common. (Act of Cong. January 27, 1831.) The act of February 6, 1839, merely gave the power to lease, and did not prescribe the form of the leases. When the leases were made, their incidents and the rights of lessor and lessee were determinable by the nature of the contract and the general law of the land. The ordinances of Carondelet can not, in any just sense, be considered as statutes, having the power to impose forfeiture. They are no more than the powers of attorney of the inhabitants authorizing certain agents to lease lands belonging to them. The corporation, in leasing its land, is acting in a private proprietary character, and not in a public municipal capacity. See Major, &c., v. Bailey, 2 Denio, 433; Grant on Corp. 129.) 4. The corporation had no power to declare forfeitures without a legislative grant, given in express terms, or by necessary implication. (Cotter v. Doty, 5 Ohio, 393.) The power reserved in the fifth section of the ordinance, and inserted in the lease, is substantially nothing more than the common clause or proviso inserted in leases from time immemorial. 5. The effect of the proviso of forfeiture for nonpayment of rent is the same, whether the lease

is declared void or the landlord has simply the right of re-entry. (1 Hare, 109 ; 2 Platt on Leases, 327 ; 4 Cruise, 73, notes.) 6. The primary object of the clause of forfeiture was to enforce the payment of rent, not to terminate the contract. 7. A demand of rent was necessary. (12 Ohio, 212 ; 17 Pet. 267 ; 1 How. 216-17.) Although the king may not be bound to make demand of rent, corporations cannot claim that privilege. (Knight's case, 5 Coke, 57.)

R. M. Field, for respondent. No demand of the rent was necessary before terminating the lease by resolution of the council. The old rule of the common law undoubtedly was, that to enable the lessor to take advantage of a clause of re-entry for the nonpayment of rent, he must, on the day when the rent becomes payable, and at the uttermost convenient time before sunset of that day, make a formal demand of the rent at the most public place on the demised premises. (Co. Litt. 201. 1 Saund. 287, note.) It is conceived that in no case would this rule be adopted by the courts here, where the demised premises were actually vacant and unoccupied. But, however it might be in respect to individuals, the rule, it is believed, never had any application to leases by the officers of public municipal corporations, who are exercising the administrative powers of the government. Coke says that when the king makes a lease rendering rent, the place of payment is not the land, but the exchequer. (Co. Litt. *ubi supra*.) All cities and incorporated towns have public offices, at which the dues of the corporation are payable. 2. The plaintiff is entitled to no relief in equity. The general rule that equity will interfere and relieve against a forfeiture incurred by the nonpayment of rent, on the ground of accident or mistake, is admitted. See 2 Platt on Leases ; 2 Sto. Eq. 506. Some of the cases go so far as to say that equity will relieve where the nonpayment is wilful ; but it is believed that the general doctrine is that there should be some circumstance of accident, mistake or peculiar hardship to justify the action of the court. (Livingston v. Tompkins, 4 Johns. Ch. 447 ; Baxter v. Lansing, 8—VOL. XXII.

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7 Paige, 350 ; Newman v. Rogers, 4 Bro. C. C. 393 ; Hill v. Barclay, 18 Ves. 60.) There is no circumstance of accident or hardship in this case. Besides, it is a settled rule, that no forfeiture incurred under the provisions of a public law can be relieved against in equity. (Peachy v. Somerset, 1 Strange, 447 ; Gorman v. Low, 2 Edward Ch. R. 324.) If the legislature had itself prescribed the terms of the leases, and when a forfeiture should be incurred, it would hardly have been contended by the plaintiff that the court could relieve in the face of an express statute. Substantially, however, that is the case now before the court. The legislature gave to the trustees of the town power to make leases and to expend the rents for municipal purposes ; and “ *all the authority necessary to carry into effect the power granted, and to do all acts that might be proper for that purpose.* ” It will not be pretended that the fifth section of the ordinance passed by the trustees was not proper to effectuate the purposes of the act, or beyond the authority delegated by the legislature. This section, then, has all the force of a statute.

Upon the same principle, courts refuse to relieve against forfeitures incurred by the nonpayment of public dues. The principle has been applied to private corporation, where the object is of a public nature. The case of Sparks v. Liverpool Waterworks Co. 13 Ves. 434, is strikingly in point.

SCOTT, Judge delivered the opinion of the court.

In considering the question presented by this record, we must bear in mind that the respondent, the city of Carondelet, is a public municipal corporation. The power of the general assembly of this state to create such bodies is unquestioned, and the expediency of its exercise is admitted on all hands. The corporations thus established, have, within the sphere of their delegated powers, as absolute control as the general assembly would have, did it retain the delegated powers, and exercise them by its own laws. The act of the 6th February, 1839,

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empowered the trustees of the town of Carondelet and their successors, to grant leases of their commons, and they were endowed with the power and authority necessary to carry into effect the object of the act. This delegation of power substituted the trustees of the town of Carondelet for the general assembly, and, to the extent of the power delegated, vested them with the right to exercise that authority as effectually as it might have been exerted by the legislative power of the state. Prior to the execution, by the trustees of the town, of the lease of the commons which gave rise to this controversy, an ordinance was passed dated the 12th day of January, 1845, which contained this requirement: "The leases shall contain a provision to the following effect, viz: That, should the rent reserved as aforesaid, or any part thereof, on any lease, remain unpaid for six months after the same shall become due, the board of trustees may, by resolution, declare such lease terminated and void, and the same shall expire and be determined from that day." The lease in controversy was made in pursuance to the terms of this ordinance. The corporation, in its political capacity, having required the insertion of the clause of forfeiture, it is as though it had been done by the legislature. Had the board of trustees, of their mere volition, leased their lands as any other proprietor might have done in the exercise of his ownership, the principle on which the plaintiff seeks relief might obtain. In such case, there might be no difference between the corporation and any private individual, and courts might exercise their equitable jurisdiction in suitable cases, in relieving against forfeitures as freely against the one as the other. The corporation having legislative power over the subject, the insertion of the clause of forfeiture, deriving its existence from legislation, is no violation of the law of the land, though it may be absolute; for it is a principle, that a clause of forfeiture in a law is to be construed differently from a similar clause in a contract or engagement between individuals. A legislature can impose it as a punishment, but individuals can only make it a matter of contract. (3 Howard, 11) From the view we

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take of the subject, the clause of forfeiture was as binding on the lessee as though it had been enacted by the general assembly. The legislature delegated its judicial powers over the matter to the corporation, and the corporation, within the sphere of its delegated power, could act as authoritatively in relation to it as the legislature. The law-making power, in fact, made the board of trustees a miniature general assembly, and gave their ordinances, on this subject, the force of laws passed by the legislature of the state. In giving the corporation legislative powers on the subject of leases, the general assembly must have necessarily intended that its ordinances should operate as laws and not as contracts. The state of things presented by this record, shows the necessity for the power exercised by the corporation. If the common-law requisites to enforce a forfeiture were made necessary, no body would collect the rents for them. The amount due from each would be so small, and the tenants so numerous, that the rents would not defray the expenses of agencies. The principle that a corporation can not impose a forfeiture without express authority in its charter for that purpose, does not affect this controversy. Such principle seems only applicable to by-laws creating offences. Such by-laws, without the sanction of usage, or of an act of the legislature, can not create a forfeiture, to be levied by distress or sale of goods for their violation. (*Kirk v. Nowil*, 1 T. R. 118; *Adley v. Reeves*, 2 M. & Sel. 60.) They may impose a forfeiture for a violation of a by-law, but it can only be collected by an action of debt, unless the distress and sale are given. (*Clark v. Tacket*, 2 Ventris, 183.) This is the meaning of the saying, that a corporation can not impose a forfeiture without express authority.

Judge Ryland concurring, the judgment will be affirmed.

LEONARD, J. I do not concur in the opinion of the majority of the court. Here is a lease reserving a money rent, the payment of which the parties have secured by a provision in it to the effect that the lease shall cease upon the rents being six

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months in arrears, accompanied by a formal resolution of the board declaring the forfeiture; and the present application is for relief against this forfeiture.

Penalties are a common expedient, resorted to everywhere, to secure the performance of contracts, and are found annexed both to obligations for the payment of money, and also to obligations for the doing or forbearing of other acts. And it would seem that, in all civilized communities, it has been found necessary to lodge in some tribunal a power to mitigate them and reduce them to the actual or probable amount of the damage the party has sustained. (1 Bell's Com. Laws of Scotland, 656; 1 Pothier on Oblig. by Evans, 345.) In English jurisprudence this relief is afforded in equity, and the ground upon which it is there placed is, in the language of the chancellor, in *Peachy v. Duke of Somerset*, (1 Strange, 447, and 2 White's Lead. Cases in Equity, 448,) "from the original intent of the case, where the penalty is designed only to secure the money, and the court gives all that the party expected or desired." Accordingly, from an early period, equity relieved at any indefinite time against forfeitures incurred by the non-payment of rent, upon the payment of principal, interest and costs, and this equity was recognized and regulated by the English legislature in the 4 Geo. ch. 28, and also by our own legislature, in a similar provision, to be found in the 20th section of the act concerning "Landlord and Tenant." To entitle the tenant to relief, he is not bound to account for his omission to pay at the appointed time, nor is he required to show any equitable circumstance giving him a title to the interference of the court, and we therefore can not withhold the relief here unless the present can be distinguished from ordinary cases of this kind.

It is to be remarked that the principle on this subject, applicable to cases of contract between party and party, is not applicable to penalties and forfeitures given by the statute or to conditions in law, and in the early case of *Peachy* against the Duke of Somerset, already referred to, the chancellor remarked

that "cases of *agreement and conditions of the party* and of the *law* are certainly to be distinguished," and on this ground he denied relief to a copy-holder, who had incurred a forfeiture of his copy-hold by making leases, &c., contrary to the custom of the manor. When the legislature inflict a forfeiture as a penalty, on account of the performance or omission of an act, those who administer the law can not relieve against it, unless there be peculiar circumstances attending the particular transaction that furnish equitable grounds for relief, (*Keating v. Sparrow*, 1 Ball & Beaty, 368); and it is supposed that the present forfeiture is of that character, and so not subject to equitable interference. The landlord here is a municipal corporation, expressly authorized by statute to grant leases of their lands, renewable forever; and having by an ordinance provided that, in all leases to be granted, a clause should be inserted to the effect that, if the rent should be in arrear for six months, the board of trustees should have power to declare the lease terminated, and that the same should cease from that time; and this clause having been put into the present lease as part of the contract, it is supposed that the forfeiture is a penalty inflicted *by law*, and not *by contract*; in other words, that the provision binds the lessee by its own force as an *ordinance* and not as one of the *terms of the bargain*. Certainly I do not so view the matter. It could not, I think, be insisted that this provision in the ordinance would have affected the tenant if it had been wholly omitted from the contract; and yet, it must have been equally obligatory in that case as in the present, if the position here suggested is to be maintained. No doubt it was competent for the legislature to provide that, in all leases to be granted by the corporation, if the rent remained unpaid, the corporation might terminate the lease by a resolution to that effect, entered upon their minutes; nor is it doubted but that such a law would have excluded the tenants from the relief to which they would otherwise have been entitled. This is substantially the provision in reference to the leases of the St. Louis commons, and such, it is believed, is the construction

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given to it. (St. Louis Commons, Act 18th March, 1835.) But the legislature have not so provided as to the Carondelet commons; and, although there was no reason for making the distinction, and, in all probability, the distinction made was accidental and not intentional, yet we can not disregard it and treat these leases as it would have been our duty to have treated them, if the effect of the nonpayment of the rent had been declared by the legislature, instead of by the corporation. In the St. Louis cases, the nullity insisted upon is declared by the law of the land; in the Carondelet leases it is the ordinance of a municipal corporation that is to produce the result; and the vice of the argument, I think, is in supposing that the legislature, in the grant of the power to make leases, included any political power to change the laws of property. The whole matter, it seems to me, may be stated in a few words. The corporation, in the exercise of their power to grant leases, have, in order to secure a punctual payment of the rent, contracted with the tenants for a forfeiture in case of nonpayment; and this forfeiture is subject to the general law of the land, for the obvious reason that it has not been otherwise provided by statute, nor have the legislature given the corporation any political authority to inflict it as a penalty. I am therefore for applying to this lease the same remedies that are applicable to all others under the general law.

AUBUCHON *et al.*, Appellants, v. MURPHY *et al.*, Respondents.

1. A certified copy from the record of a memorandum of sale, not a Spanish archive, executed December 26, 1786, and not recorded before the year 1811, may, under the "act concerning evidence," (R. C. 1845, p. 469, 470,) be read in evidence only upon proof of such facts and circumstances as, together with the certificate of acknowledgment or proof, will satisfy the court that the person who executed the instrument is the person therein named as grantor.

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Appeal from St. Louis Court of Common Pleas.

This is an action in the nature of an action of ejectment, by plaintiffs, Aubuchon and Vallé dit L'Anglais, to recover an undivided portion of a tract of three by forty arpens, in the Grand prairie common field of St. Louis. The plaintiffs claim title under the widow Hebert, to whose representatives it is alleged the said tract was confirmed; L'Anglais claiming an undivided one-tenth of said tract by descent from her, and Aubuchon, the other plaintiff, an undivided one-fifth of the same, as having purchased the said interest from other heirs of the said widow Hebert. The defendants denied plaintiffs' right of possession or title, set up title in themselves, and state that the most southern one of the three by forty arpens had been conveyed by widow Hebert to Labuxiere in 1777, and that the two northern ones had been sold at the church door before December, 1786, by Charles Sanguinet, as testamentary executor of widow Hebert. Defendants claim title by virtue of the said conveyance and sale, and further allege that they, and those under whom they claim, had had possession of the tract sued for for more than twenty years prior to the commencement of this suit. On the trial, plaintiffs introduced in evidence the concession to the widow Hebert and the confirmation to her legal representatives, and the United States survey thereof, being survey No. 1256, and also introduced evidence tending to prove a derivative title in plaintiffs under the widow Hebert.

Defendants introduced evidence tending to show a derivative title in themselves, from the widow Hebert, through a conveyance from her to Joseph Labuxiere, dated July 9th, 1777, of the most southern of the three lots. The defendants then offered in evidence archive No. 2389, a translation of the material parts of which is as follows: "No. 2389. In the town of St. Louis of Illinois, on the 30th day of November, in the year 1784, in consequence of the decease of Helene Danis, widow of Ignace Hebert, deceased, who (widow Hebert) died intestate in

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this said town, on the 28th day of the present month, I, Don Francisco Cruzat, lieutenant colonel of infantry, commander-in-chief, and lieutenant governor of the western part and district of Illinois, went at about half-past nine, A. M., of that day, to the residence of the aforesaid deceased, accompanied with the assisting witnesses, Mariano Yzayuirre, and Josef Barnes, to make the inventory and appraisement of all the property belonging to the said deceased; for that purpose have been selected and officially appointed as appraisers, Sylvester Sarpy, Charles Sanguinette, Joseph Motard, and Pierre Perry, who promised on oath faithfully and lawfully to perform the duties of that office, and every thing being valued in money, the present inventory was commenced in the following manner: One and a half arpens of land in front by forty arpens in depth, situated in the Grand prairie, between the cultivated lands of Louis Chevalier (Cheballier) and Joseph Brazeau, valued at twelve livres (12). [There were numerous articles enumerated, which it is unnecessary to set forth.] And after having proceeded with the inventory from three o'clock, P. M., to half-past five, P. M., as nothing more was found belonging to the estate of the said Helene Danis, deceased, the present inventory was closed, it being written on eleven leaves, including this; the appraisement amounting to the sum of six thousand three hundred and thirteen livres fifteen cents, and all the aforesaid property was placed under the care of Charles Sanguinette, to keep and preserve it under the strict obligation to divide among the lawful and nearest heirs of the aforesaid deceased, with judicial authorization and according to the rights of every one, the property of the said (widow Hebert) as enumerated in this inventory. He accepted of this charge and swore to fulfil the duties of it in a faithful and lawful manner, considering that he was officially instructed with it for the object so mentioned; therefore he signed this inventory in the presence of the assisting witnesses and of the said appraisers, who signed also with myself, the said lieutenant governor, on the same day and year

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as above. Chs. Sanguinet, Pre. Peri, Josef Bermeo, Joseph Motard, Mariano Yzayuirre, Franciso Cruzat, Stre. Sarpy."

"To the lieutenant governor: Sir — Charles Sanguinet, a merchant of the town of St. Louis, in the best form, according to law, represents to you, as administrator, officially appointed, and having under his care the property belonging to the estate of the deceased, Helene Danis, that it is advantageous to the heirs, some of whom are under age, that all the property be sold at public sale, to the highest bidder, and that the purchasers having given a good and sufficient security, residing in this town of St. Louis—the term of payment for all the purchasers at the end of September, in the year 1785; I therefore beg you to order and decree according to my demand, which is just, and I swear, in due form of law, that it does not proceed from any evil design, &c. St. Louis of Illinois, December 11th, 1784. Chas. Sanguinet."

"Considering the foregoing petition, let the object of said petition be granted, and let the morning of the 13th inst. be indicated for the beginning of the sale; let this be made known to Charles Sanguinet. St. Louis of Illinois, December 11, 1784. Franc°. Cruzat."

"In the town of St. Louis of Illinois, on the 13th day of December, 1784, I, Franc°. Cruzat, commandant and lieutenant governor of the western part of Illinois, in virtue of the foregoing petition presented by Chas. Sanguinet, as administrator, and having in his possession the property which has been inventoried as belonging to the deceased, Elena Danis, I went at about 10 o'clock, A. M., accompanied *with* the assisting witnesses, Mariano Yzayuirre and Josef Bermeo, to the residence of said deceased, to dispose at public sale all of said property; and when a sufficient number of people had collected, it was made known to the public that the purchase money should be paid during the month of September of next year, 1785, in current money of this country, or in shaved deer-skins, of merchantable quality, at the rate of forty sous a pound, each pur-

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chaser to give a good and sufficient security residing in this town; and after having proceeded with the sale from three o'clock, P. M., to five, there being no more effects of said estate to be sold, the present sale has been terminated (the minutes of which cover sixteen leaves, including this one,) and the proceeds amount to the sum of 10,907 livres and 10 sous in money, payable in the course of September of next year, 1785; and the said assisting witnesses and administrator have signed with me, the said commandant and lieutenant governor, on the day and month and year aforesaid. Chs. Sanguinet, Josef Bermeo, Mariano Yzayuirre, Franc^o. Cruzat."

To the reading of this paper in evidence the plaintiffs objected, because, 1st, not filed in the cause as an exhibit; 2d, not properly authorized; 3d, incompetent and irrelevant. But the court admitted the paper, and plaintiffs excepted.

Defendants then offered in evidence a certified copy of a memorandum of sale, recorded in the recorder's office of the county of St. Louis, on the 18th June, 1811, as recorded in the original record, in book C, p. 396, and the acknowledgment as recorded at p. 401 of the same book, which is as follows:

"27 Jan^r 1785. Nous, Louis St. Ange de Bellerive, capitaine commandant de la partie Française aux Illinois, et Joseph Labuxiere, sub-deleguée de monsieur l'ordinnateur de la Louisiane, et sur la demande de la dame veuve Hebert, habitante laboreuse qui désire cultiver la terre nous lui avons concédé et concedons à titre de propriété pour elle ses hoirs on ayant causes, une terre situ^{ée} à la Grande prairie, contenant trois arpens de face sur le profondeur ordinaire de quarante arpens, tenant d'un côté à Guillaume Bisete, et de l'autre côté au nomm^e Taillon, aux conditions de mettre en valeur la dite terre sous l'an et jour, et qu'elle sera sujette aux charges publiques et autres qu'il plaira à sa majesté d'y imposer. Donn^é à St. Louis aux Illinois, le dix-huit Juillet, mil sept cent soixante-neuf. Signé sur le registre—St. Ange et Labuxiere. Enregistré folio 28. J'ay, exécuteur testamentaire de madame Helene Denis, veuve Hebert, reconnais et certifié d'avoir vendu

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à la porte de l'église a la *criée au plu aux en cherisseur* [?] la présente *tarres* que de deux arpens à Mr. Joseph Brazeau pour prix et somme de quarante livres en argent, dont je reconnait que de Sr. Brazeau m'a payé comptant, dont quit à St. Louis des Illinois, le 26 Décembre, 1786. Chas. Sanguinet." "Recorded this 18th day of June, 1811. M. P. Leduc, recorder."

"State of Missouri, county of St. Louis, ss. I, the undersigned, recorder in and for the county of St. Louis, do hereby certify the foregoing to be a true copy of an instrument of writing, and also of the date of recording the same, as fully as the same remains of record in my office, in book C, p. 396. Witness my hand and official seal, at St. Louis, the 28th day of January, 1852. S. D. Barlow, recorder. (Seal.)"

"See p. 396. Territory of Louisiana, district and township of St. Louis. Before me, the subscriber, one of the justices of the peace in and for the township aforesaid, personally came and appeared Charles Sanguinet, who acknowledged the within instrument, to-wit, the deed bearing date the 26th December, 1786, to be his act and deed for the purposes therein contained. Given under my hand this 29th day of June, 1811. M. P. Leduc, J. P. Recorded this 29th day of June, 1811. M. P. Leduc, recorder."

"State of Missouri, county of St. Louis, ss. I, the undersigned, recorder in and for the county aforesaid, do hereby certify the foregoing to be a full and complete copy of a certificate of acknowledgment, of the reference in the margin, and of the date of recording thereof, as fully as the same remains of record in my office, in book C, p. 401. Witness my hand and official seal at St. Louis, the 28th day of January, 1852. S. D. Barlow, recorder. (Seal.)"

The defendants also offered, in connection with the said certified copies, the index of said record book, as follows, and also the first volume of the general index of said recorder's office of St. Louis county; also the record books themselves; to all which the plaintiffs objected, because, 1st, said papers had not

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been filed in this cause ; 2d, not properly authenticated ; 3d, not originals, but copies, and copies of copies ; 4th, imperfect and incomplete ; 5th, incompetent and irrelevant and illegal. The court below admitted this paper, and the plaintiffs excepted, and took a nonsuit, with leave to move to set the same aside ; which was accordingly done in due time, and this motion was overruled, and plaintiffs excepted.

Defendants claimed to derive title under the said two instruments to the two northern of the three by forty arpent lots, and introduced evidence tending to show a derivative title to them from Joseph Brazeau.

T. Polk, for appellant. 1. The copy of the record of a paper purporting to be a deed or memorandum of sale from Charles Sanguinet to Joseph Brazeau, dated Dember 26th, 1786, ought to have been excluded from the jury. It was not filed in the cause. (Code of Practice, art. 7, § 13.) That which was offered was either a copy of the original memorandum of sale (the record itself) or a copy of a copy of the same. The original ought to have been produced or its loss or destruction shown. (1 Stark. Ev. 336 ; R. C. 1845, p. 227.) This memorandum was not admissible under either the 13th or 14th sections of the act concerning evidence. (R. C. 1845, p. 469.) It was not an archive : this is admitted. If it be treated as an American instrument, it was not entitled to be recorded at the time of the record, June 18, 1811, because not acknowledged. (1 Terr. Laws, 47, 58, 179.) It was not acknowledged until June 29, 1811, and then the certificate of acknowledgment, and not the deed, was recorded in a different place in the record book ; never having been recorded together as one instrument, and consequently was not admissible under either the 16th, 17th, 18th or 19th sections of the act concerning evidence. (R. C. 1845, p. 469, 470.) The sale to Brazeau by Sanguinet, as set forth in above memorandum, was not authorized by the order of the lieutenant governor, as contained in the paper purporting to be archive No. 2389. The date of

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the memorandum is more than two years after the time fixed by the order for the sale.

Field and Shepley, for respondent. 1. The court properly admitted in evidence the memorandum of sale by Sanguinet, as administrator of widow Hebert. It was admissible under the 18th section of the act concerning evidence. (R. C. 1845, p. 469.) It was admissible also on the ground that it is a document from which, after the lapse of time and other circumstances, the jury might presume a judicial sale. (1 Cow. & Hill's notes, 386 to 371.) It was at least good evidence of a color of title, upon which to base a title by virtue of the statute of limitation, and as showing the extent of the possession. See 6 Metc. 337; 5 Metc. 15, 173. It was no objection to its admissibility that no testimony was offered to prove the loss of the original, it not being an instrument that is supposed to be in the possession of defendants; the admission of a copy was wholly within the discretion of the court. Nor is it an objection to its admissibility that the deed and the acknowledgment were recorded at separate places in the same book; nor is there any discrepancy between the order of sale in the inventory and the facts as stated in the memorandum of sale. The memorandum does not show when the sale was made. If any discrepancy exists, it does not effect the question of the admissibility of the memorandum.

LEONARD, Judge, delivered the opinion of the court.

The written memorandum of sale by Sanguinet is treated by both parties as an American instrument, and of course it has not been insisted that the copy was competent evidence as a certified copy of a French or Spanish archive, under the act of 16th February, 1847, "to preserve ancient archives." The only question therefore is, whether it was admissible under the act of 1845, concerning evidence. The plaintiff objected to the instrument for want of proper proof of authenticity, and insists

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here upon every objection that he is entitled to make. If it had been the original instrument, instead of a copy, we think it should have been excluded for want of the proof of the grantor's identity, required by the 18th section of the act of 1845, concerning evidence, and that for this reason the judgment must be reversed. We incline to think that, notwithstanding the other objections that have been taken to it, the paper might have been received as a certified copy, under the 19th section of the act, upon such proof as would have satisfied the court of the grantor's identity; but no such proof was made, and the objection is insisted upon, and we have no power to dispense with it, however merely formal it may be in the particular case.

Very considerable changes have, from time to time, been made in our registry laws. Before the act of December, 1821, no proof of the grantor's identity was required, and neither recorded deeds nor certified copies were authentic instruments of evidence until the act of 1825. This act allowed deeds, proved and recorded under it, and certified copies, to be read in evidence upon the proof there required. Subsequently, the legislature went a step further, and provided in the 17th section of the act of 1845, before referred to, that all conveyances proved or acknowledged according to the existing law, although not declared to be evidence, should be received in evidence, if they had been recorded within one year from the date (the time prescribed by the first law of 1804, for the registry of deeds, and subsequently reduced to three months by the act of 1817,) and more than twenty years before they are offered in evidence, thus substituting in lieu of the proof of identity required by the act of 1821, what the legislature deemed equivalent proof—a registry made recently (not exceeding one year) after the execution of the deed, and twenty years' exposure to the public upon the records of the proper county. In the subsequent (18th) section, they go yet further, and provide for deeds that do not carry with them this evidence of authenticity, and allow them also to be read, although not recorded within one year, and more than twenty years before the trial, upon such facts,

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as, together with the certificate, will satisfy the court of the identity of the grantor; and in the succeeding (19th) section, if the original is lost or destroyed, or not in the power of the party, a certified copy may be received upon the same evidence required in case of the original.

This is the law, and if a party desire the benefit of its provisions, he must make the required proof—we cannot dispense with it. The judgment is reversed, and the cause remanded.

UBSDELL & PIERSON, Appellants, v. CUNNINGHAM, Respondent.

1. Instruments in the following forms: "Due A. B. \$100, to be paid over to him as soon as collected at P., now in the hands of H. B. P. of that place," and "Due A. B. \$34 63 for goods purchased of him while at P., to be paid as soon as collected from my accounts at P.," are promissory notes, not mere conditional obligations to pay. The words "to be paid," &c., merely prescribe the time of payment by indicating the fund out of which the debtor expects to pay, and thereby securing to him the delay necessary to render it available.
2. When all has been collected upon the claims that can be collected at all, the notes become due and payable.

Appeal from St. Louis Law Commissioner's Court.

This was an action originally commenced before a justice of the peace, and taken thence by appeal to the law commissioner's court. The cause of action was founded on the following instruments, notes or due bills: "New York, March 7, 1849. Due Messrs. Ubsdell & Pierson one hundred dollars, to be paid over to them as soon as collected at Pokeepsie, now in the hands of Horace B. Potter of that place. (Signed) H. D. Cunningham." "\$34 63. Due Messrs. Ubsdell & Pierson, thirty-four dollars and sixty-three cents for goods purchased of them while at Pokeepsie, to be paid as soon as collected from my accounts at Pokeepsie. New York, March 7, 1849. (Signed) H. D. Cunningham."

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On the trial before the law commissioner's court, the following agreement or stipulation was given in evidence on the part of the plaintiffs: "John A. Ubsdell and Charles Pierson v. Henry D. Cunningham. It is stipulated in this case that the notes and accounts placed in hands of H. B. Potter, mentioned in the due bills sued on in this case, have been collected before this suit was brought, so far as said notes and accounts were collected. August 22, 1854." It was also in evidence that plaintiffs were in March, 1849, co-partners, under the name and style of Ubsdell & Pierson, and doing business in the city of New York. There was also evidence tending to prove that unsuccessful efforts had been made by H. B. Potter to collect the accounts left in his hands by defendant, Cunningham, and that such accounts were now collectable.

Upon this evidence, the court, on motion of defendant, instructed the jury that the plaintiffs were not entitled to recover; whereupon the plaintiffs took a non-suit, with leave to move to set the same aside; which motion having been made and overruled, the case is brought here by appeal.

Krum & Harding, for appellants, cited *Sears v. Wright*, 11 Maine, 278.

Reber, for respondent. 1. The instruments of writing sued on are payable conditionally, and are therefore not promissory notes. (Story Prom. Notes, § 22; *Hill v. Halford*, 2 Bos. & Pul. 413.) 2. Not being notes, a consideration should have been proved. 3. The obligation of the defendant to pay is conditional and plaintiffs' proof showed that the condition had not happened and by no fault of defendant. (*Allen v. Davis*, 11 Mo. 479.)

LEONARD, Judge, delivered the opinion of the court.

The only question that can be made here is, whether the obligation incurred by these notes is suspended upon the condition that the accounts referred to should be collected, or whether the words in one note, "to be paid as soon as collected

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from my accounts at Pokeepsie," and in the other, "to be paid as soon as collected at Pokeepsie, now in the hands of H. B. P. of that place," ought to be understood merely as prescribing the time of payment, by indicating the fund out of which the debtor expected to pay, and thereby securing to him the delay necessary to render it available. Both notes contain direct acknowledgments of indebtedness, the language being "Due Messrs. U. & P. — dollars," although only one of them discloses the cause of it (goods sold); and we think the subsequent words, "to be paid," &c., were not intended to show that the debts were conditional—depending for their existence as valid demands against the makers, upon the fact that the sums to be paid could be collected out of the accounts referred to, but only to prescribe the time of payment, by reference not to days and years, but to a reasonable time for the collection of the accounts. This construction is warranted by the language used, and we have no doubt will execute the real intention of the parties.

It being admitted that all had been collected upon these claims that could be collected, the term prescribed for the payment of the notes had expired, and they became due according to our construction of them. The judgment is therefore reversed, and the cause remanded, Judge Ryland concurring.

KEYSER, SURVIVOR OF CARLISLE & KEYSER, Respondent, v.
RAWLINGS AND OTHERS, Appellants.

1. In an action of forcible entry and detainer, where the defence relied on is that the entry complained of was made after an abandonment of the premises by the plaintiffs; *held*, that evidence offered by defendants to the effect that previous to the alleged abandonment and the forcible entry complained of, the plaintiffs, then being tenants of one W. C. (claiming under whom the defendants made their entry) fraudulently attorned to one J. M., is inadmissible.
2. Where, in an action of forcible entry and detainer, one of two co-plaintiffs, who had, previous to the entry complained of, been in joint possession of

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the premises entered upon, dies, the survivor may recover all the damages sustained by such forcible entry and detainer.

3. *Quere.* Whether the estate of the deceased co-plaintiff is not entitled, in such case, to one half the sum recovered.

Appeal from St. Louis Court of Common Pleas.

This case has heretofore been in this court. The case is reported 18 Mo. 166. This was an action of forcible entry and detainer, brought before a justice of the peace, and removed by *certiorari* to the Circuit Court, and afterwards by change of venue to the St. Louis Court of Common Pleas. The complaint was by Carlisle & Keyser, as plaintiffs, against D. A. Rawlings, Thomas Rawlings, Isaac H. Sturgeon and Rowland Chambers, and stated, that on the 30th August, 1849, plaintiffs were in the peaceable possession of block No. 288, of the city of St. Louis, and the same premises upon which the said Carlisle & Keyser had been carrying on a steam saw-mill, which had been burnt down a short time previous to the date aforesaid; that on said date, while the said Carlisle & Keyser were peaceably possessed of said block, the defendants, with force, entered upon and into said block and took forcible possession thereof, and ever since have and still do forcibly detain the same from said Carlisle & Keyser, and that by threats and terror they turned Carlisle & Keyser out, and forcibly detain the possession from them.

After the change of venue to the Common Pleas, the death of Carlisle was suggested, and the suit continued to be prosecuted in the name of Keyser alone.

On the trial, the plaintiff introduced evidence tending to prove that Carlisle & Keyser were partners in the brick-making and saw-milling business; that their saw-milling business was carried on by them on block No. 288, the premises in controversy; that they had been in possession of said premises for two or three years prior to the burning of the saw-mill on said block; that said mill was burned down in August, 1849; that after the fire, said Carlisle & Keyser were in possession of said block, collecting the materials and lumber not burned, and the

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wreck of the mill, up to the evening before the alleged forcible entry, a short time after the fire; that on the morning succeeding said entry it was found that said block had been enclosed by a fence during the night time or very early in the morning; that the fence was up the next morning after Carlisle & Keyser quit work the evening before, and that Keyser went up to the fence, shook it, and demanded possession; that D. A. Rawlings, T. Rawlings and Rowland Chambers, defendants in this suit, were inside of the fence, together with other persons, with guns and pistols; that the said defendants had employed the persons who built a shanty upon said premises, and put up a fence around the same, and refused to vacate the same when possession was demanded, as above stated by the plaintiff, Keyser; that upon the said premises, when taken possession of, was the wreck of the mill and engines, which were afterwards hauled away.

Defendants, on cross-examination of one of the plaintiffs' witnesses, asked the following questions, to-wit: "Were Childs and Emerson assignees of the tenancy of Hull, Allen & Childs, and tenants of Wm. Chambers? Did they all sell to Carlisle & Keyser their interest in the premises as tenants of William Chambers in 1847? Did Carlisle & Keyser fraudently attorn to John Maguire after becoming tenants of William Chambers in the premises in question?" The plaintiffs objected to said questions, and the court refused to permit any of them to be put to the witness. Defendants duly excepted.

Defendants also introduced evidence tending to prove that the fence was put up on the 30th of August; that Carlisle & Keyser had abandoned the premises after the burning of the saw-mill and before the entry was made and the fence put up, and that at the time said fence was put up no one was in possession of the ground. Defendants also offered to prove, by reading the petition in a suit brought by John Maguire against Isaac H. Sturgeon, that said Maguire, in that suit, claimed to be the owner of the wreck of the said saw-mill after it was burned down. The court excluded this evidence, and defendants duly

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excepted. Defendants also offered to prove that the premises in question were, in 1826, and from that time until the first day of May, 1848, in the possession of William Chambers; that in June, 1845, Hall and Allen and Childs went into the saw-mill in question and put engines into and occupied the premises as tenants of Wm. Chambers; that they continued as tenants of the premises until the spring of 1846, when Joshua J. Childs and Primus Emerson succeeded Hall, Allen and Emerson, as tenants of said property, under Wm. Chambers, and are the owners of engines in the saw-mill; that they fraudulently attempted to attorn to John Maguire, as their landlord, in the spring of 1847, about the 9th day of May; that they continued to recognize Wm. Chambers as their landlord up to the time that Carlisle & Keyser went into possession under John Maguire; that Carlisle & Keyser knew that Childs and Emerson were tenants of William Chambers, and that they had attempted to attorn to John Maguire; that Childs and Emerson had made a private sale of the engines and fixtures of the saw-mill in question to John Maguire, and that John Maguire put Carlisle & Keyser into possession of the mill in the place of Childs and Emerson; that Carlisle & Keyser were not owners of the engines and fixtures of the mill; and that John Maguire was, at the time of the fire, the owner of the engines, boilers and fixtures in said mill. The court, on objection made by plaintiff, refused to permit such proof to be given; and defendants duly excepted.

The court gave the following instructions, asked by plaintiffs: "1. If the jury believe from the evidence, that Carlisle & Keyser were in possession of the premises described in the complaint prior to and up to the time of the burning of the mill spoken of by the witnesses, and that Carlisle & Keyser continued in possession of said premises until the fence spoken of by the witnesses was put up; and if the jury shall also believe from the evidence that the defendants, Daniel A. Rawlings, Thos. Rawlings and Rowland Chambers, or either of them, after the burning of said mill, took possession of said premises and

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employed or took upon said premises a large number of men, with guns and other deadly weapons for the purpose of keeping possession of said premises, and that the men so taken on said premises, by threats or menaces of a violent character towards Keyser, or towards any of his agents and servants employed to labor on said premises, frightened said Carlisle & Keyser or their agents or servants out of possession, and detained and held the same; if these facts appear from the evidence to the satisfaction of the jury, they should find for the plaintiff, unless the defendants have shown in evidence to the satisfaction of the jury that Carlisle & Keyser had abandoned the possession of said premises before the defendants took possession of the same. 2. If, prior to the commencement of this suit, Carlisle & Keyser were in the peaceable possession of the premises in dispute, by having thereon their property and servants and employees, engaged in any business of said C. & K., up to the close of the day, and that said C. & K., their servants and employees, left the premises for the night, intending to return thereto in the morning to pursue such business of said C. & K. as they had at the said premises, but that in the meantime and before the return of C. & K., their agents and employees, the next morning, defendants, or either of them, with a large force of men, entered upon said premises and enclosed the same with a fence in the absence of said C. & K., their servants and employees, said defendants, intending by force and by the display of deadly weapons to take and hold possession of said premises and keep out the said C. & K., their servants and employees, from the possession thereof; that any one or more of said defendants who so entered upon and who kept and held the possession of said premises, and kept out said C. & K. by force and by the display of deadly weapons, is guilty of the forcible entry and detainer alleged. 3. In order to establish an abandonment of the premises in question by Carlisle & Keyser, it must appear from the evidence to the satisfaction of the jury, that Carlisle & Keyser actually left said premises with the design and intention not to further use, possess or occupy

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said premises. The mere declaration on their part of an intention to abandon said premises is not taken alone proof of an abandonment, but the jury must be satisfied from the evidence that such expressed intention was actually carried into effect by said Carlisle & Keyser, and that they left said premises with the intention not to occupy the same again. Although the jury may believe from the evidence, that Carlisle & Keyser, or one of them, after the burning of the mill, declared their intention not to rebuild or carry on the milling business again, that declaration, unless accompanied or followed by actual abandonment, is not sufficient to show or establish an abandonment by Carlisle & Keyser of the premises in question. 4. Although it should appear in the case of any defendant that he was not actively engaged in making the forcible entry and detainer, as complained of, yet, if the jury are satisfied from the evidence that such forcible entry and detainer was made in manner and form as alleged, and that such defendant was at the time aiding and abetting, by his counsel and advice, those who did make said forcible entry and detainer, and that he did employ, hire and pay those who made the same, to make it, then such defendant is guilty as if he had actively participated in the making such forcible entry and detainer."

To the giving of these instructions defendants excepted. The court then, on its own motion, gave the following: "6. If the jury believe from the evidence that any witness has knowingly testified falsely in regard to any material fact in this cause, then they are at liberty to disregard his testimony altogether. It is, however, the exclusive province of the jury to determine what weight should be given to the testimony of each witness, or to any part of his testimony. 7. If the jury find for the plaintiff, they can allow damages only for the premises in the possession of Carlisle & Keyser, and from which they were dispossessed by the defendants or either of them." To the giving of which, defendants also duly excepted.

The defendants then asked and the court gave the following: "1. If the jury believe from the evidence, that Carlisle & Key-

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ser, immediately or within a week after the fire, abandoned the premises in question and declared their intention of never returning to said place, and that defendants, or some of them, entered in after such abandonment, then the plaintiff can not recover in this action for forcible entry and detainer, and the jury should find the defendants not guilty. 2. The declarations of Rufus Keyser, the plaintiff, are competent evidence to show abandonment in this cause, so as to bar the action of Keyser for forcible entry and detainer; and if the jury believe from the evidence, that Carlisle & Keyser had ceased to occupy and did not intend to return to said premises, or to have any thing more to do with them before the fence was erected, then the plaintiff can not recover and the jury will find the defendants not guilty. 3. If the jury believe from the evidence, that Carlisle & Keyser had no other business and carried on no other business on said premises in question than that of running a saw-mill there; that at the time of the fencing done in this case, the premises in question were vacant and unoccupied by any one for or in the employment of Carlisle & Keyser, and that said mill had been previously burnt; that Carlisle & Keyser, after the fire, and before the fencing, sold off all their logs on said premises, and their houses and wagons and wheels, and removed their lumber, and ceased to use and occupy or work, in person or by their hands, upon the said premises, and after the fire and before the fencing they ceased to occupy the said premises in any manner, and declared that they did not intend to go back there or have any more to do with the premises, and that C. & K. did not afterwards have any thing to do with the saw-milling business there or elsewhere, but carried on other and different business from that date; these are circumstances from which the jury may find that C. & K. did abandon the said premises. 4. In order for the plaintiff to recover against the defendants, or either of them, it is necessary for the plaintiff to show by evidence, to the satisfaction of the jury, that the defendants, or either of them, were in some manner connected with the forcible entry or detainer; that the entry or detainer

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were upon or against the actual possession of C. & K. ; and if the plaintiff has failed to show these facts satisfactorily to the jury, then it is the duty of the jury to find the defendants not guilty. If Carlisle & Keyser were in possession of said premises the day previous to the fencing, and had left the same the night previous with the intention to return and occupy the same, then they were in actual possession within the meaning of this instruction. 5. The plaintiff is required in this action, in order to recover against all of the defendants, to show that the defendants charged were in some way connected or acting together in the matters charged, and an entry by the defendants at different times, without any connection or joint design with each other, will not authorize a joint recovery against them, and the burden of showing the connection or joint acts of the defendants in the premises is upon the plaintiff."

The court refused the following, asked by defendants : " 4. If the jury believe from the evidence that the witness, Matthews, has knowingly testified falsely that the fence was put up in the night, and also falsely in swearing that there was no fence on the premises when he left at night, and that there was a fence on the place on the next morning at day-light, or that the said witness has knowingly testified falsely in any other matter material in this cause, then the jury is required to disregard his testimony altogether ; for the rule of law is, that a witness proved to be false in one thing, is to be deemed false in all things. 5. If the jury believe from the evidence that the witness for the plaintiff, Matthews, has knowingly testified falsely in regard to any material fact in this cause, then the jury is instructed that they are to disregard his testimony altogether. 6. If the jury believe from the evidence that Carlisle & Keyser abandoned the said premises at any time, then the plaintiff, is only entitled to recover damages, if the jury find for the plaintiff, for the period of time between the fencing and the day of abandonment. 7. This plaintiff is only entitled to claim in this action one half of the damages that may be found by the jury, if the jury find for the plaintiff. 8. This

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plaintiff can not recover in this action if the jury believe from the evidence that he abandoned the possession before the fence was erected; and if the said Keyser had really abandoned the premises before the fencing, he could not acquire any right to sue in this action by going to the fence and shaking it, or by demanding possession after the abandonment. 9. The plaintiff, if he recovers at all, can only recover damages for the premises C. & K. actually occupied, and plaintiff can not recover damages for the fencing of premises, or for including within the fence, that enclosed the mill, other premises on which the said Carlisle & Keyser had occasionally scattered logs for the purpose of a temporary easement until they could be sawed. The plaintiff is limited in his claim for damages to the premises actually occupied by C. & K., and fenced by defendants at the time of the fencing. 10. The action of forcible entry and detainer is a proceeding in the nature of a joint action, and the plaintiff can not recover against any one or more of the defendants unless he can recover against all of them, and the acquittal of one defendant is a bar to any further proceeding against the other defendants."

The jury found for the plaintiff, and the defendants bring the case here by appeal.

B. A. Hill and *Shepley*, for appellants. 1. The court below improperly rejected the testimony offered on the part of defendant of a fraudulent attornment on the part of Carlisle & Keyser to John Maguire, a stranger, when they entered into possession, by and under the tenants of Wm. Chambers. The main ground of defence was that, after the fire, Carlisle & Keyser abandoned the premises, and, in the strongest terms, expressed their intention of never returning there again. In order to show that this intention, thus strongly expressed, was a fixed purpose of abandoning all claim of possession, the defendants proposed to show that Carlisle & Keyser originally took possession of their property with a fraudulent intent of ousting the real owner and person in possession, and retaining possession for John Maguire. While the mill was in existence, as

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they paid no rent to the real landlord, they might very well find it to their interest to do this; but when the mill burned down, and they had not only no idea of rebuilding the mill, but no idea of continuing in the saw-milling business, then they had no motive any longer to retain this land thus fraudulently for John Maguire. It was then a bare possession, without chance of profit, or motive for continuance. If, then, we had been permitted to show that Carlisle & Keyser were mere tenants at sufferance, liable to be dispossessed at once; that all their hopes of gain were at an end; it would have increased the probability of an abandonment of the premises by Carlisle & Keyser. 2. The court improperly rejected the evidence offered on the part of defendants, tending to prove that the engines, &c., the wreck of the mill, belonged to John Maguire and not to Carlisle & Keyser. This would have shown that, after the fire, there was nothing on the lot belonging to Carlisle & Keyser, and thus, with the other facts, have rendered the alleged abandonment more probable, and thus have conduced to prove the same. 3. The verdict and judgment were in favor of Keyser, who survived, for the whole amount of the damages, which the jury found had been sustained, when, in fact, Keyser could only recover one half thereof. The instruction asked by defendants was therefore improperly refused. The complaint was in the names of Carlisle & Keyser for an injury to their joint possession as tenants in common. No intimation is given in the original complaint that Carlisle & Keyser were partners, or sued as such. No amendment has been, or can be made, and they stood precisely in the situation of any other tenants in common, bringing a suit jointly for an injury to their joint possession. (See *Carlisle & Keyser v. Rawlings*, 18 Mo. 166.) The fourth section of fifth article of act concerning "Justices' Courts," (R. C. 1845, p. 650,) does not apply to proceedings under the act of "Forcible Entry and Detainer." This is a proceeding *sui generis*. The section above referred to was intended to apply only to the ordinary jurisdiction of justices' courts, and has no application to the special jurisdiction conferred upon

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justices of the peace by the act "Concerning Forcible Entry and Detainer."

Krum & Harding and Glover & Richardson, for respondent.

LEONARD, Judge, delivered the opinion of the court.

The only questions relied upon in argument, in this case, relate to the exclusion of the evidence offered by the defendants below in relation to the circumstances under which the plaintiff took possession of the lot in controversy, and to the right of a surviving plaintiff in this proceeding to recover all the damages sustained, and we think there is nothing in either objection that requires us to reverse the judgment.

It is contrary to the fundamental principles of every system of civil law, to allow persons to enforce their own rights by *strong hand*. The law protects the possession of every one, no matter how acquired, from actual violence, and therefore even the true owner of land can not expel by force a wrongful possessor. The remedy provided by our law for such a wrong, is the summary proceeding by forcible entry and detainer, in which the relief afforded is a restitution of things to their former condition, by restoring the complaining party to the possession of which he has been deprived, and allowing him double compensation for the damages actually sustained. The principle upon which the remedy is given is stamped upon the face of the act in the emphatic declaration, that "the merits of the title shall in nowise be inquired into."

Here, it seems to have been admitted that the plaintiffs had been in possession, and the only question litigated at the trial was, whether the possession had been abandoned before the defendants entered. The rejected proof showing that it was originally taken by the plaintiffs against right and so held, was, it is insisted, proper evidence to aid the presumption afforded by the other proof in the cause, that the plaintiffs, when they left the lot at night, did so with the intention of not returning

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again, because, in point of law and morals, they ought not to have returned, and had no inducement to do so. To allow such proof however, we think, would be a palpable evasion of the law, and generally defeat its execution, and we are clearly of opinion that it was properly excluded.

In relation to the other point, it may be remarked that here there was a joint possession, and this possession, without any reference to the title of the party, is the thing protected. The suit is for a wrong to this joint right, and the suit did not abate, as was decided when the case was here before (18 Mo. 166) by the death of one of the parties, but survived to the surviving plaintiff; and we now think that, upon principle, the survivor must recover all the damages sustained. The question, as to the right of the estate of the deceased co-plaintiff to one half, is a question between other parties. It is enough for the defendants here that this judgment will protect them. The judgment, with the concurrence of the other judges, is affirmed.

GORMAN, Plaintiff in Error, v. SAGNER AND OTHERS, Defendants in Error.

1. An acceptance, by one having a mechanic's lien upon a building, of a deed of trust upon the same, to secure the payment, at a future day, of promissory notes given for the debt which gave rise to the lien, amounts to a waiver of the lien.

Error to St. Louis Circuit Court.

Scire facias to enforce a mechanic's lien. Among other facts which it is unnecessary to state, it appeared upon the trial that the plaintiff, Gorman, had accepted from Sagner, for whom the work and labor that gave rise to the lien was done, and who was at that time owner of the building upon which the same was done, two promissory notes payable in ninety days and four months, and also a deed of trust upon said building

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to secure the payment of said notes. Billings, one of the defendants, claimed said building by purchase at sheriff's sale, under a judgment upon a mechanic's lien. On the trial, plaintiff offered to surrender the two notes of Sagner. The court ruled that plaintiff could not recover.

Krum & Harding and Gray, for plaintiff in error. 1. The execution of the notes and the deed of trust to plaintiff by Sagner did not extinguish plaintiff's lien. It was not an equitable but a legal lien, expressly given by statute, and would not be merged by a mortgage, deed of trust, or judgment. Nothing but payment or an express release would discharge it. (14 J. R. 404; 2 Browne, 297; 14 S. & R. 32; 1 Hals. Ch. 485; 5 Watts, 118; 2 Miles, 214; 6 B. Mon. 67; 2 Wheat. 390.) 2. No injustice would be done to Billings by allowing plaintiff to recover; for plaintiff's lien was regularly filed in the Circuit Court, and suit was commenced on it, before Billings bought, and he bought therefore with full notice. He was bound to take notice of plaintiff's lien claim from the filing of it.

Knox & Kellogg, for respondent.

Scott, Judge, delivered the opinion of the court.

From the view we take of this case, it will not be necessary to determine the points of law raised on the trial; for if the plaintiff's lien was extinguished, it follows as a consequence that he can not recover.

The record raises the question whether the giving of notes, payable at a future day, and a deed of trust to secure their payment on the property on which the lien exists, is a waiver of the mechanic's lien for the debt secured by the notes and deed of trust. Did this question concern only the immediate parties to the deed, it would be a matter of little consequence how it was determined. But when the acts of individuals became the motive to the conduct of others, it is important that such acts should be made to bear their natural construction, so that deceit and imposition upon third persons may be prevented.

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When a mechanic's lien exists for a debt, if the giving of a deed of trust to secure the payment at a future day of notes executed for that debt, when that deed covers the identical property covered by the lien, is not a waiver of the lien, it would be difficult to say what act by implication of law would constitute such a waiver. The notes being for the debt secured by the mechanic's lien, and payable at a future day, that lien could not be enforced during the time the notes had to run; and on their becoming due, there being a power in the trustees to sell the premises for their payment, no end would be attained by holding on to the mechanic's lien. Why this should be done but for the purpose of discharging the lien and substituting another mode of satisfaction in its stead, it is difficult to imagine. Such conduct is entirely inconsistent with the idea of the continuance of the lien, and third persons who act upon the faith of such conduct should not be deceived and disappointed of their just expectations. If either party to the transaction was overreached or was in error as to its consequences, that error can not be remedied at the expense of third persons.

The cases cited by the plaintiff have been examined, and they do not contradict any thing here said. Although there may be some distinction between an equitable lien and one expressly given by law, yet there is nothing in the cases hostile to the idea that a lien conferred by statute may be extinguished by implication arising from the conduct of the parties. The strong feature in this case is, that the deed of trust was on the very property subject to the lien. Had it been on other property the case might have been different. Courts are inclined to regard securities as cumulative, when it can be done without violence to the rights of third persons.

From the view we have taken of the case, it can make no difference that the lien was filed when the defendant, Billings, became the purchaser. The deed of trust was also in existence.

The judgment will be affirmed, the other judges concurring.

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CLARK & LEMMON, Defendants in Error, v. BROWN AND OTHERS,
Plaintiffs in Error.

1. Where a *scire facias* to enforce a mechanic's lien is issued against the contractor who built the building against which the lien is claimed, and also against the owners thereof, and it appears on the trial that plaintiffs had not given the notice of the claim of lien to plaintiffs within the time required by statute, the owners, however, not contesting in their answer the validity of the lien on the ground of the want of the requisite thirty days' notice, and not excepting to any act of the court during the progress of the trial, and making no motion in arrest of judgment or for a new trial; *held*, that the contractor can not be permitted to attack the validity of the lien on the ground of a want of timely notice, though he may contest the plaintiffs' demand, so far as the validity and extent of the debt is concerned.

Error to St. Louis Circuit Court.

Scire facias to enforce a mechanic's lien under the St. Louis mechanics' lien act of February, 1843. The *scire facias* issued against Brown, the contractor for the erection of the building upon which a lien is claimed to exist, and Scarritt & Mason, owners thereof. Scarritt & Mason, in their answer, "admit that they received notice of plaintiffs' claim on the 22d day of July, 1852." "They pray the court to protect them in any judgment that may be rendered against the said Brown or the said building." It is not alleged in this answer that the notice given was not given within the proper time. Brown filed a separate answer. It was shown on the trial that the notice of the claim of lien was given to Scarritt & Mason more than thirty days after the accrual of the indebtedness for which the lien is claimed. In the statement of the demand of plaintiffs, filed in the Circuit Court, the building upon which the lien was claimed was described as follows: "A certain four story brick warehouse, situated between Second and Third streets, and between Vine street and Washington avenue, on the south side of said Washington avenue." On the trial, plaintiffs were permitted to amend their *scire facias* by inserting the following allegation: "The said Wm. G. Clark and Andrew Lemmon hav-

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ing given to the said owners notice of their intention to hold the said warehouse for said demand." Scarrett & Mason assented to this amendment. Brown demurred to the amended *scire facias*; the demurrer was overruled. The record shows that defendant, Brown, alone excepted to the action of the court below in receiving evidence objected to, in refusing instructions, &c. The jury gave a verdict for plaintiffs.

Barrett, for plaintiffs in error. The court erred in permitting the amendment of the *scire facias*. Such a writ can not be amended by inserting any thing not in the record upon which it is founded. There was no notice given to the owners of the building within thirty days after the accrual of the indebtedness, and no copy of this notice was filed with the lien. (Sess. Acts, 1842, p. 83.) The description was not good. (Ib. p. 84, § 4.)

Polk, for defendants in error. Scarrett & Mason, the owners of the building, do not object to the sufficiency or timeliness of the notice of the lien, or of the lien itself. The statute provides for giving notice to the owner for his benefit and not for the benefit of the contractor. The contractor has nothing to do with the matter of giving notice to the owner, and should not be permitted to raise objection on that score. It is Brown who makes all the objections in this case.

LEONARD, Judge, delivered the opinion of the court.

In order to constitute a valid lien in favor of a material man under a contract, not with the owner, but with the contractor, pursuant to the St. Louis mechanics' lien act of February, 1843, it is essential that the party who desires to acquire the lien should give notice of his intention to the owner within thirty days after the indebtedness accrued, or the completion of the building or improvements. If, however, the owner or his agent can not be found, a written notice may be placed, as a substitute for the personal notice, upon some conspicuous part of the building, and a copy filed in the proper office with the lien. Of

course this written notice, which is allowed in case of the party whose duty it is to give notice, must be affixed to the building within the same time prescribed for personal notice. It is suggested in the present writ of *scire facias*, that the plaintiff had notified the defendants of his intention to fix a lien upon the building, but it is not averred or shown that it was given within the required time, or in what manner, whether personally or constructively—whether by delivering the notice to the party, or affixing it upon the building, and filing a copy in the clerk's office with the claim for the lien. The notice, however, in one form or the other, within the required time, is manifestly essential to create a valid lien against the building, where the materials are furnished or the work done under a contract with any person other than the owner, and the suggestions of the writ would seem to be insufficient to warrant us in imposing this debt as a lien upon the building.

But the difficulty is that, so far as Brown, the contractor, is concerned, this is a part of the case in which he has no interest, and the owners, the only parties really interested in it, make no objection. It is true, both contractors and owners may be and probably are proper parties to the *scire facias*—the contractor, because he is interested in the question of indebtedness, being bound to indemnify the owner against this charge upon his property—and the owner, because his property is thereby subjected to the payment of the debt, his interest extending to both debt and lien, as the latter involves the former. It is true that all these parties bring the case here, and join in the assignment of errors; but the owners do not in their answer expressly contest the lien on the ground of the want of the thirty days' notice, nor do they except to any act of the court during the progress of the trial, and they have neither moved for a new trial or in arrest of judgment, and, we presume, do not in fact complain here of the alleged error.

The points, too, made by Brown, that we consider of any weight, are confined exclusively to matters affecting the validity of the lien, and do not touch the extent or validity of the debt;

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and the judgment is a special one against the building only, and not against the property or person of Brown, and can not affect his interest in any particular, that we can see. It would probably conclude him in a subsequent suit by the owners against him for indemnity, as to the validity and extent of the debt, and so far he may unquestionably contest the plaintiff's demand; but we see no reason why he should be allowed to go further and call in question things in which, so far as he shows, he has no interest. The judgment is affirmed.

PATRICK & OTHERS, Appellants, v. BALLENTINE & OTHERS,
Respondents.

1. Under § 3 of act of February 24, 1843, (see Sess. Acts, 1843, p. 83,) which provided that "every person who wishes to avail himself of the benefit of the preceding sections, shall give notice to the owner, owners, or agent, within thirty days after the indebtedness accrued, or the completion of the building or improvement," &c.; *held*, that one who gives notice of his claim of lien for materials furnished, more than thirty days after the indebtedness for such materials accrues, has lost his lien by his delay, although such notice may have been given within thirty days after the completion of the buildings. (Scott, J., dissenting.)

Appeal from St. Louis Land Court.

The facts of this case fully appear in the opinion of the court.

Hudson & Thomas, for appellants. 1. The date of the last item in the account filed, is the date of the accruing of the accounts. Although this statute of February 24, 1843, provided an extraordinary remedy, it should be liberally construed. The notice of lien may be given either within thirty days after the debt accrues, or thirty days after the completion of the building. The creditor has his election.

Glover & Richardson, for respondent. 1. This is wholly a statutory remedy. It was never intended by the law that the

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owner should pay his contractor at his peril, or withhold all payments until thirty days after the completion of the building; for, in many instances, several years are required to complete a house; and it would be paralyzing to the spirit of improvement if the owners of buildings were compelled, by a judicial construction of this law, to withhold all payments to their employees until their work is finished. It is for the encouragement of mechanics that contractors should be paid during the progress of their work; but if it be decided that a sub-contractor for work or the material man can withhold notice to the owner, no matter when the demand accrues, until the building is completed, then every owner, in self-defence, will withhold all payment until thirty days after the building is completed. The true construction to be given to this section is this: if the indebtedness accrues before the completion of the building, notice must be given to the owner within thirty days after such accrual; and if it does not accrue until the completion of the building, then within thirty days thereafter. The lien is a mere incident of the debt, and, if the position taken by appellants is maintained, cases may occur where the sub-contractor would be defeated in an ordinary action against the contractor, by the statute of limitations, but would escape the operation of that statute by bringing himself within the lien law, and be rewarded for his negligence by making his debt out of the property of another. 2. Within the meaning of the act, the indebtedness accrued on the date of the last item of the account. (9 Mo. 558, 653; 12 Mo. 477; 16 Mo. 266.)

RYLAND, Judge, delivered the opinion of the court.

This case arises under the mechanics' lien law, for the county and city of St. Louis, passed by the legislature in February, 1843. (Sess. Acts, 1842-3, p. 83.)

The plaintiffs filed their statement and account for materials furnished in the office of the clerk of the Land Court of St. Louis county, on the 3d of September, 1853. The account

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contains a particular statement of each item in it, the date of it, the character of the item, and the price. The first item was furnished and is dated March 11th, and the last item May 28th. The year is not named in the account, but it is obvious that it was 1853 from what appears on the record. The notice of this account, in proper form, was served on the defendant, Ballentine, on the 8th July, 1853, more than thirty days after the last item of the account had been furnished. The account was for materials furnished the defendants, Black and Frakes, for building a house for the defendant, Ballentine. The account for the lumber was closed on the 28th May; the indebtedness for the materials furnished accrued on that day.

On the trial of the *scire facias*, the plaintiffs offered to prove the correctness of their account; the furnishing of the items mentioned; the price at which they were furnished and delivered to the contractors on said building *before the completion* of the same, and that the materials were used in, upon and about the erection and construction of said building, and that the notice mentioned was duly served on defendants within thirty days after the completion of said building. The defendants objected to this evidence, and the court excluded it. The plaintiffs excepted, and then suffered a nonsuit, with leave to move to set the same aside. This motion being made and overruled, the case is brought here by appeal.

The question here is, was this evidence properly excluded? This depends upon the construction of the third section of the act before mentioned, which reads as follows: "§ 3. And be it further enacted, that every person who wishes to avail himself of the benefit of the preceding sections, shall give notice to the owner, owners or agent, *within thirty days after the indebtedness accrued, or the completion of the building or improvement*, provided they can be found; and in case they can not be found, then a notice shall be placed upon a conspicuous part of the building or improvements, that there is such an amount due thereon, and that he or they intend to hold the said building or improvements until the true sum due is paid; and a

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copy thereof shall be filed with the lien ; but the above limit, in regard to notice, shall not extend to persons having contracts with the owner, owners or agent." Does this section allow the material or lumber merchant, who contracts to furnish the contractor of the work with materials, thirty days after the building or improvements are completed, or thirty days after the indebtedness accrues to him, without regard to the completion of the work on the building or improvement? Every person who wishes to avail himself of the benefits of the preceding sections, shall give notice to the owner, owners or agent, *within thirty days after the indebtedness accrued, or the completion of the building or improvement.* Now what is the meaning of this sentence? Has the party furnishing the materials to the contractor the right to give his notice within thirty days after his debt for the materials furnished has accrued? and has he the right also to lie by until the building is completed and paid for by the owner, and then come forward within thirty days after such completion, give his notice, and affix his lien upon the building for the materials furnished, and subject the owner to a second payment for the materials?

The act was for the benefit of "every mechanic, artisan, workman or other person doing or performing any work upon or furnishing any materials for buildings or other improvements, or for repairing the same"—not embracing the contractors of the work only, but all workmen engaged by such contractors and doing work on such buildings and improvements. A contractor was thereby prevented from drawing all his pay for the work and then failing to pay his laborers or his lumber merchants. These lumber merchants could give notice within thirty days from the accrual of the indebtedness to them, to the owners of the buildings or improvements, and not wait for the completion. But there might be a class of workmen, or artisans, or others, doing or performing work upon or about such buildings or improvements, whose debts might not become due until the completion of the buildings or improvements; the accrual of the debts of all such as took place on the completion

of such buildings or improvements, must be reckoned from such completion, and consequently the notice of these debts must be given within thirty days from the completion of the buildings or improvements.

The contractor who makes the bargain to do the work is not limited to the thirty days in giving his notice. Why so? Because the owner or agent is not liable to be called on by him, for either work or materials furnished, otherwise than in pursuance of his contract. This contract is known to the owner or agent; they know whether there is any thing due the contractor on it or not, and are not liable to be deceived or imposed upon on account of it.

But the thirty days' notice is a limitation upon the demands of others. And, according to our view and interpretation of this statute, the persons furnishing the materials are not allowed to wait until the completion of the buildings or improvements, and within thirty days from the event give their notice. This act was for their benefit among others; but when they can obtain this benefit by one construction, and, at the same time, cause no injury or harm to be done thereby to the owners, that construction should be favored.

Whenever the indebtedness accrues to the persons mentioned in this act, within thirty days thereafter they shall give the notice, if they wish to obtain its benefit. The legislature made the two periods from which the thirty days began to run, in order to embrace every reasonable demand. One period was the accrual of the indebtedness. The other was the completion of the buildings or improvements. No claim should be a lien unless the creditor gave the notice within thirty days after the buildings or improvements were completed. That was the utmost limit for any demand to be made a lien. None should go beyond that. But all were not allowed to wait that long. Whenever the debt was due—whenever the work or labor had been done, and the indebtedness for such was due or had accrued—whenever the materials had been furnished and the payment therefor could be demanded, then, in all such cases, the

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notice must be given within thirty days thereafter, or such debts could not be liens on the buildings or improvements. The persons who furnish materials know when their demands become due and payable. Then, within thirty days, let them give the owners notice, and thereby save the owners from paying the contractors for these very materials, which the furnishers may seek to have fastened on the buildings as a lien. Artisans, laborers and others know when their wages become due; let them give the notice within the thirty days, and thereby save the owners from paying a contractor who might absorb all and leave his workmen nothing.

The act must be construed so as to render the greatest amount of benefit to those for whose interests it was made, and, at the same time, to save from injury the other class of persons upon which it operates, as far as practicable.

In this case, then, the indebtedness accruing on 28th May, and the notice not being given until 8th July following, the thirty days had elapsed and the notice was not in time to affix the debt as a lien on the buildings or improvements of the defendant, Ballentine.

I confess we had some perplexity in construing this statute. But we conclude that the legislature did not intend to fix the running of the thirty days for the notice at any one of two periods for the same debt; that is, the notice should be given within thirty days from the accrual of the debt or from some other event. But that they meant to place the completion of the building and the accrual of the indebtedness as two distinct periods—separate events, from one or the other of which, accordingly as the facts exist, the thirty days should commence running. Any merchant, therefore, furnishing materials to a contractor for a building or improvement, has the right to give the owner notice of his debt from the day of the indebtedness becoming due; any laborer for his work, from the day his wages become due: not only have they the right, but it is their duty to do so, if they wish the benefit of this statute.

The judgment is therefore affirmed, Judge Leonard concurring.

SCOTT, Judge. This was a proceeding under the act of the 24th February, 1843, entitled "An act for the better security of mechanics and others erecting buildings, or furnishing materials for the same, in the city and county of St. Louis." The only question involved in the record is, whether the plaintiffs, not having given notice to the owner of the building within thirty days after the indebtedness for the materials accrued, are entitled to recover.

The third section of the act above referred to, prescribes that "Every person who wishes to avail himself of the preceding sections, shall give notice to the owner, owners or agent within *thirty days after the indebtedness accrued, or the completion of the building or improvement.*"

It was maintained on the part of the defendants, that this clause of the section should be so construed as to require all indebtedness accruing before the completion of the building or improvement, to be notified to the owner, within thirty days after it was incurred, and all indebtedness incurred at the completion of the building, to be notified within the same time, so that the notice required by law should, in all cases, be given within thirty days after any debt was created, for materials furnished or labor bestowed on the building. This, no doubt, would be the safest construction for the owner, and if the interpretation of the statute could only operate prospectively, there would be no hardship in adopting it. But as any construction it may receive must affect past transactions, I do not feel myself at liberty to depart from the ordinary rules of interpretation, and thereby defeat the just expectations which were founded on the words of the law. Where the words of a statute are of a doubtful meaning, courts will always adopt such a construction as will produce the least inconvenience; but when the language of a law is plain, the duty of the courts is to follow its direction. The adoption of the interpretation contended for by the defendants, would defeat a settled rule of the construction which requires that all the words of a statute should have some effect, where it is possible. Now, if we hold that the meaning of the

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law is that notice should in all cases be given within thirty days after any indebtedness has been created, we deprive of all force and effect the words, *after the completion of the building or improvement.*

The mischiefs of the contrary construction are more imaginary than real. Persons whose necessities compel them to labor for a livelihood, are not apt to be too indulgent to those who employ them, or buy their materials. Their wages are necessary for their support, and there is no danger that the owners of buildings will sustain any injury by their remissness in collecting them. In my opinion, the judgment should be reversed.

SMITH, Plaintiff in Error, v. MEEGAN, Defendant in Error.

2. A bailee, who has a boat in charge for the purpose of repairing it, is bound to use ordinary diligence in its preservation, and is liable for any damage occasioned by launching the boat into the river at a time and under circumstances of great danger which ought to have been foreseen, and which result in the destruction of the boat, and that, too, although the actual destruction of the boat may not take place until about twelve days after the launching, by the breaking up of the ice.

Error to St. Louis Court of Common Pleas.

Demurrer to a petition. The petition is as follows :

Plaintiff states that said defendant, Meegan, in the month of December, 1853, at the request of plaintiff, undertook to make certain repairs upon the steamboat Asia, then the property of plaintiff, of the value of \$11,000, and, for that purpose, it became necessary to, and defendant did, by his servants and agents, haul said boat out of the Mississippi river upon a certain marine railway, commonly called "The Marine Railway," on the bank of the Mississippi river, in the upper part of the city of St. Louis, said railway then being in the possession and use of said defendant, and there made certain repairs upon said

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boat. Plaintiff further states, that on the 19th day of January, 1854, said boat then being on said railway, and the said river full of floating ice, said defendant, by his agents and servants, undertook, in the afternoon of said day, to launch said boat into the river, it being exceedingly dangerous then to do so; in consequence whereof, plaintiff objected and remonstrated against their so doing; nevertheless, the agents and servants of defendant persisted therein, and some time after dark of said day, placed said boat off of said railway into the said river.

Plaintiff avers that it was the regular business of defendant to make repairs upon steamboats at said railways, and that having undertaken to make repairs upon said steamboat Asia, and having taken the same out of the river upon said railways, for that purpose, as was necessary, it became and was the duty of the defendant to keep said boat upon said railway, after such repairs were made, until she could be launched without putting her in imminent peril and danger of destruction from the then condition of the river. Plaintiff states that said river, at and near the place aforesaid, was rock-bound, affording no safe harbor for steamboats in time of ice; that the ice was then running so thick as to render it impossible for said boat to escape to a safe harbor; that it was then probable and almost certain that the river would close that night, and impound said boat, which, in fact, it did so, leaving no chance for escape—leaving said boat in imminent peril from the breaking up of the ice afterwards, by which, on or about the first February, 1854, she was wrecked and destroyed. Plaintiff avers that said boat might have remained in safety on said railway until after the breaking up of the ice as aforesaid, and then launched in safety; that her being launched in time and manner as aforesaid, and placed, by the act of the agents and servants of defendant, in peril, from which she could not be removed, was the cause of her destruction. Plaintiff avers that he used all reasonable means in his power for the safety of said boat, before she was wrecked, and to save the wreck; and that what was

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saved of the wreck, after due diligence, was only of the value of one thousand three hundred and ninety dollars.

Plaintiff avers that, from the time of launching said boat as aforesaid, until her destruction, there was no time when she could, by proper diligence on the part of the plaintiff, have been removed to a place of safety; that she was placed in immediate danger of destruction, by the acts of defendant's agents and servants, the moment she reached the water, and that the danger continued at all times imminent up to the time of her destruction; that the signs and circumstances, at the time of launching her, were such as to forewarn and apprise any prudent man of the impending danger, and the consequences which did ensue might have been naturally expected from thus launching said boat at the time. Plaintiff avers that said loss happened without any fault on his part, and that thereby he has sustained damage to the amount of six thousand six hundred and ten dollars, for which he asks judgment against defendant, and for his costs and for interest from the commencement of this suit.

To this petition the defendant demurred, and for causes of demurrer assigned the following: 1. The said petition does not state facts sufficient to constitute a cause of action. 2. It is matter of law that said defendant was not bound, by virtue of his office as owner of said railway, to keep vessels thereon after the repairs to be made thereon were finished. 3. It appears from the statements of the petition that the loss complained of was the result of atmospheric changes occurring after the said boat was launched, and it also appears that the launching of said boat did not expose her to danger and cause her loss, but that the loss alleged in the petition arose (according to the statements in the petition) from events which it was impossible to foresee or provide against. 4. It appears that said loss arose from causes the operation of which was suspended for twelve days after said launching, and that then the said causes were put into activity by influences beyond the control of the defendant. 5. It is a matter of law that there was

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no such duty (according to the facts stated in the petition) as plaintiff has in his petition supposed, whereby defendant was bound to keep said boat on the marine railway after her repairs were completed. 6. It appears from the petition that the loss complained of was a remote and not a proximate result of any act wherewith the defendant is charged. 7. It does not appear from said petition that plaintiff offered to pay or compensate defendant for allowing the said steamboat to remain on the railway of said defendant after the completion of her repairs. 8. It sufficiently appears from said petition that said boat was not put into the water from off of said marine railway until the contract of said defendant (if any) with said plaintiff, in respect thereof, was fully performed.

The court gave judgment on the demurrer for the defendant. The plaintiff brings the case here by writ of error.

B. A. Hill, for plaintiff in error. 1. There was a clear case of loss by the negligence of defendant made out, and it was error to decide as a matter of law that the loss was not caused by the negligence of the defendant. This was a matter of fact for the jury. The issue was one of fact. (See 4 McCord, 220; Story's Bail. § 429, 15; 1 Camp. 138; 4 Barn. & Ald. 21, 36, 41; 5 id. 342; 1 Stark. 238.)

Gantt and Hudson & Thomas, for defendant in error. 1. The damage here was too remote. The boat lived uninjured at least twelve days amidst the perils in which it is alleged it was placed by the defendant; and when the loss occurred, it was caused by atmospheric changes taking place subsequent to the act of defendant. The law would hold the defendant responsible only for such loss or damage as could have been foreseen at the time the boat was launched, and which must have been the natural and proximate result of such launching. (See 1 Chit. Pl. 371, 441; 1 Dow's R. 207; Sedgwick on Dam. 70, 75, 80.) 2. It was no part of the contract that the boat should remain on the ways after it was repaired, nor is any custom or usage to that effect alleged.

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LEONARD, Judge, delivered the opinion of the court.

The defendant was bound to use at least ordinary care for the preservation of the plaintiff's boat, and if he launched it into the river at a time and under circumstances of great danger, which ought to have been foreseen, and which resulted in the destruction of the boat, notwithstanding the use of all proper care on the plaintiff's part, he must bear the loss occasioned by his own improper conduct. This is the case substantially presented by the petition, and the judgment must therefore be reversed, and the cause remanded, in order that the matter may be tried upon the proof.

Judgment reversed, and cause remanded.

BENNETT, Appellant, v. BELT'S ADMINISTRATOR, Respondent.

1. A. owning the legal title to a steamboat, as to one half of which B. is the beneficial owner, made a bill of sale of one half of the said boat to C.; held, in a suit by B. against C.'s administrator, for a balance of the purchase money remaining due, that evidence is admissible, to show that the bill of sale was made by A. at the request of B., and was intended by the parties to convey the interest of B.

Appeal from St. Louis Circuit Court.

This case came originally from the Probate Court of St. Louis county, whence it was taken by appeal to the Circuit Court. Anthony Bennett, appellant, presented to the Probate Court, for allowance, against the estate of defendant's intestate, a claim for a balance of \$699 43, alleged to be due to the said Bennett upon purchase of one half of the steamboat Saluda from the said Bennett. In the account presented to the Probate Court, the consideration of the said purchase was set down as being \$1532 43, upon which a credit of \$833 was allowed.

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Upon the trial of this case in the Circuit Court, plaintiff gave in evidence the deposition of Peter Conrad, who testified that in March, 1852, he executed a bill of sale to Francis T. Belt, defendant's intestate, for a part of the steamboat Saluda; that before Belt bought, witness, Conrad, and Anthony Bennett, (appellant,) were owners of said boat in equal moieties thereof; that the whole title stood in witness' name for the convenience of Mr. Bennett; that Belt, after his purchase, paid part of the purchase money, to-wit, \$833, by lifting a note made by Bennett and Conrad for that amount.

Certain questions and answers contained in Conrad's deposition, to the effect that Belt purchased his interest in the Saluda from Bennett, through Conrad; that Bennett was the owner of the one-half interest transferred by the bill of sale executed by Conrad; that the consideration was \$1200 and one half the debts which the boat owed at the time of the purchase, the whole of which amounted to between \$600 and \$700—not to exceed the latter sum; that Belt never paid any part of the debts of the boat, assumed by him,—were stricken out on the motion of defendant, to which plaintiff excepted.

Defendant then gave in evidence the bill of sale dated March 22, 1852. It was an ordinary bill of sale of a steamboat, executed by Conrad, transferring to Belt one half of the steamboat Saluda in consideration of \$1200. This bill of sale was under seal, and contained a covenant of warranty on the part of the said Conrad against all lawful claims and demands against said one half of said boat Saluda. At the foot of the bill of sale was the following in writing, and signed by the plaintiff, Bennett: "I hereby certify and guarantee the validity of the foregoing sale, and do hereby quit claim to any interest I may have had in said steamboat Saluda—day and date above written. [Signed] Anthony Bennett."

In rebuttal, plaintiffs introduced one Simmons, who testified that when Belt bought an interest in the Saluda, he took up a note for \$833, given by Conrad and Bennett to one Page, a former owner of said boat, from whom said Conrad and Ben-

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nett had purchased her. The balance of what Belt was to pay was to be applied on another note given to said Page by Conrad and Bennett, at the time of their purchase.

The cause was submitted to the court, a jury being waived, and judgment was given for the defendant.

Krum & Harding, for appellant.

T. T. Gantt, for respondent. 1. The action should have been in the name of Conrad and Bennett.

LEONARD, Judge, delivered the opinion of the court.

The plaintiff's case assumes that he was the beneficial owner of one half of the boat, the legal title to which stood in the name of Conrad, the other part owner, and that he made a verbal sale of his half to Belt, the defendant's intestate, for which the latter was to pay twelve hundred dollars and one half of the debts; and that, in order to execute the contract on his part, Conrad, at his instance, made a written transfer to Belt of half of the boat. This is substantially the proof offered, and the court excluded the main part of it upon the ground that the written transfer of the title concluded the matter, and that it appeared by that instrument that the sale was made by Conrad and not by Bennett, and of course that the contract to pay was with him and not with the plaintiff. This, it seems to us, is a total misapplication of that very wise rule of law that forbids parties who have adopted a written memorial of their contract to contradict it afterwards by oral evidence. This bill of sale is not the written evidence of the contract between Bennett and Belt—that transaction was not put in writing; but after it was made, the bill of sale was executed by Conrad, by direction of Bennett, as a performance of Bennett's undertaking.

The evidence ought to have been received, and the plaintiff permitted to prove the verbal contract between himself and Bennett, and to recover whatever sum he was entitled to for a breach of that contract.

The judgment is reversed, and the cause remanded.

Ripsey v. Evans.

RIPSEY, Respondent, v. EVANS, AND OTHERS, Appellants.

1. A person who holds himself out as a partner may be charged as a partner ; and where in a petition a person is charged as partner, and the proof shows merely that he has held himself out as a partner ; *held*, that this is no variance.

Appeal from St. Louis Circuit Court.

This was an action to recover the value of certain lumber furnished to the defendants as partners, at their request, and particularly at the request of defendant, Dennis. No answer was filed by any defendant except Dennis, who denied that at any time he did business as a partner with the other defendants ; that they alone were partners, and that he (Dennis) was their clerk. The cause was submitted to the court sitting as a jury, and the plaintiff introduced proof showing that previous to the time the lumber was furnished, the other defendants, then doing business as partners under the name and style of Evans, Harris & Co., had been dealing with plaintiff, and, in the language of the witness, had "got tight up;" that about that time Dennis came to plaintiff's office and asked what the debt of Evans, Harris & Co., was, and went on to state that he was "going in with them;" that he had gone around and collected what the "concern" owed, and was satisfied ; that afterwards, in ordering lumber, he said, "let our wagon have" such and so much lumber ; that he talked of "our" property, and said that he was going down to the Republican office to give "us" a puff ; with other evidence tending to the same result. It was also in evidence that plaintiff never would have trusted the other defendants alone.

Defendant introduced evidence tending to prove that previous to and about the time of the furnishing of the above lumber, an agreement was made between the other defendants, then doing business under the name and style of Evans, Harris & Co., on the one side, and Dennis on the other side, by which it was agreed that Dennis should loan the firm of Evans,

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Harris & Co. \$5000; that they should take Dennis as their clerk to manage finances, at a salary of \$1000, and if, at the expiration of one year, Dennis should desire to become a partner, then the \$5000 should be considered a payment of his share; but if not, then the \$5000 should be payable six months after notification; and said Evans, Harris & Co., the defendants, executed a deed of trust of certain real estate, to secure the payment of the money loaned. It also appeared on cross-examination, that the said real estate had been sold under the said deed of trust, and bought in by Dennis and sold again. The court found that defendant, Dennis, held himself out to plaintiff as a member of the firm of Evans, Harris & Co., as composed of J. Evans, E. Evans, James Harris and Thomas Dennis, and that in faith thereof the plaintiff furnished the lumber, the value of which is sought to be obtained in the present action, and gave judgment for the plaintiff for \$148 86, with interest from commencement of suit.

B. Bates, for appellant.

Shepley, for respondent. 1. The facts proved on the trial and found by the court sustain the averments of the petition. It is no variance because the court failed to find that a partnership, as to themselves, existed between the defendants. The proof sustains the finding.

Scott, Judge, delivered the opinion of the court.

We see no reason to disturb the finding of the court. It seems to be warranted by the evidence, or at least there was evidence enough to support it. Nor does the finding discredit the evidence on the part of the defendants. As to them, Dennis may not have been a partner; but nothing is more familiar than that persons, as between themselves, may not be partners, whilst they will be so considered as to third persons.

We see no variance between the proof and the cause of action as stated. The defendants were sued as partners, and the evidence conduces to establish the same fact. If Dennis held

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himself out to the world as a partner, though not a partner in fact, yet he was one as to the world, and it was proper to charge him as such with the other partners.

The other judges concurring, the judgment is affirmed.

GEYER, Plaintiff in Error, v. GIRARD, Defendant in Error.

1. Section 3 of the "act regulating conveyances," (R. C. 1845,) does not relate to conveyances of leasehold interests.
2. Where a lessee executes to his lessor a deed of trust upon the leasehold interest to secure the payment of a note given as a part consideration for the lease, and, before the maturity of the note, the lessee is evicted by one having a paramount title, and then takes a lease of the same land from the person so evicting, this lease will not enure to the benefit of a purchaser under the deed of trust.

Error to St. Louis Land Court.

This is an action in the nature of an action of ejectment. The facts as found by the court and agreed upon by the parties, are as follows: In the year 1849, John Girard, the defendant, leased from one Maria Solms, the premises in question for the term of ten years. Besides the rent reserved, he (Girard) agreed to pay \$100, and gave his promissory note for the same, secured by a deed of trust upon the said lease. In the year 1852, and before the said note became due, the defendant, Girard, was ejected from the leasehold premises by one E. R. Mason, holding under a superior title. After such ejectment, the defendant, Girard, held a portion of said premises, (how long after, does not appear,) as tenant of said E. R. Mason, by a lease. It is agreed by the parties that the said E. R. Mason is the true and legal owner of the premises. After the maturity of said note, default being made in the payment of the same, the trustee of said Maria Solms sold to the plaintiff the premises of the defendant, held by the lease from M. Solms, and conveyed by said deed of trust. The plaintiff hav-

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ing thus purchased the leasehold estate of the defendant, held by the lease from M. Solms, and conveyed by said deed of trust, relying upon that title, now brings this suit for the possession of said premises, as to all right thereto held by defendant under the said lease from Mason.

The court, sitting as a jury, found for the defendant and gave judgment accordingly.

Delafield and Kribben, for plaintiff in error.

Jones & Sherman, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

It is plain that in this case the after acquired title does not pass to the grantee in the deed of trust, by virtue of the third section of the act concerning conveyances. That section relates only to estates conveyed in fee simple absolute, and in its terms to no other estates. The subject of the conveyance under consideration is a leasehold interest. The circumstance that it is regarded as real estate by some of our statutes, does not affect this question.

The case must then stand on the reasonableness and justice of it. The doctrine in relation to after acquired estates passing by a former deed of the grantor, is not applicable to the circumstances of this case. The bare statement of the proposition is a sufficient refutation of it. A lessee, in addition to his annual rent, agrees to pay a sum in gross by way of bonus, and gives a deed of trust on the demised premises to his lessor to secure the payment of this sum. Afterwards, the lessee is evicted and takes a lease of the premises from the person by whom he has been evicted by a paramount title, and who is the real owner of them. Now it is maintained that this after acquired title passed by virtue of the express or implied warranty contained in the deed of trust, and that a purchaser under that deed acquired the title the lessee obtained under her last lease.

The purchaser under the deed is in no better situation than the original lessor, for whose benefit it was given. The terms

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of the deed under which he purchased was notice to him, as the deed on its face showed that an after acquired title could only come in the event of the failure of the title obtained under the first lease, which was the sole consideration of the deed of trust. The other judges concurring, the judgment is affirmed.

VOGEL, Defendant in Error, v. VOGEL'S ADMINISTRATOR, Plaintiff in Error.

1. A stipulation in a marriage contract to the effect that in case the wife should survive the husband, she should receive from the estate of the husband the sum of \$200, is valid; such an instrument is not a testamentary disposition, but creates a legal liability in favor of the wife, and she may bring suit on the same after the decease of her husband, against his representatives.

Error to St. Louis Court of Common Pleas.

The case is fully stated in the opinion of the court.

C. Gibson, for plaintiff in error.

Hart & Jecko, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

This was a suit in the Common Pleas, by Magdalena Vogel against Henry Vogel, as the administrator of the estate of Everhard Vogel, deceased, on the following contract: "This marriage contract, made and entered into on this 16th day of April, 1850, by and between Everhard Vogel and Magdalena Schlessler, both of the county of St. Louis and State of Missouri, witnesseth, that, whereas, said parties are at present desirous to become united in the holy bonds of wedlock; therefore, for the better understanding of parties, it is mutually hereby agreed between them, as follows, to-wit: First, in case of the demise of party of the first part, Everhard Vogel, prior to party of the second part, Magdalena Schlessler, then and in that case she is to receive from the estate of party of the first

part the sum of two hundred dollars, cash, for her own benefit and behalf forever; second, in case of the death of party of the second part prior to that of party of the first part, then and in that case all the property, of whatever description, that she now has, or hereafter may have, is to descend to the children of party of second part, by her first husband, Frederick Schlessler." This agreement was signed and sealed by the parties, and witnessed by Joseph Kountz.

The plaintiff sues for the two hundred dollars promised to her in this marriage contract. There was a demurrer by defendant to the petition, which was overruled, and judgment afterwards rendered by default in favor of the plaintiff. The defendant excepted, sued out his writ of error, and brings the case to this court.

The defendant, plaintiff in error, relies upon the following point for a reversal: That this contract is a testamentary disposition, and does not create a legal liability so as to constitute the plaintiff a creditor; that she should go into the Probate Court and claim as a distributee; and that this action can not be maintained.

This court will therefore only notice this point. In our opinion this is a valid and subsisting contract, and that a legal obligation is thereby created in favor of the petitioner to demand the sum of money from the estate of her deceased husband. The marriage of the parties did not destroy the petitioner's rights; her cause of action did not accrue until after the dissolution of the marriage, and the promise to her to have the sum of two hundred dollars from his estate paid to her, authorizes her to sue for it in the court below. In *Gage v. Acton*, decided in king's bench, in the 11th year of William III, it was held that a bond with a condition, &c., given to a *feme sole*, is not discharged by her marrying the obligor. After several arguments at the bar, the court, consisting of three judges, gave separate opinions, and Gould and Turton, justices, were of opinion that the bond was not destroyed, nor the debt extinguished by the marriage. Holt, chief justice, was

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of a contrary opinion. This opinion of Holt's was afterwards mentioned with regret by Lord Kenyon, chief justice, in the case of *Milbourn v. Ewart et al.*, (5 Term Rep. 384): "I can not but lament," said Lord Kenyon, "that he (Holt) had recourse to such flimsy and technical reasonings to enforce a case so directly against law and conscience." The case of *Gage v. Acton* is reported by Carthew, at p. 511; 1 Salkeld, 325; 12 Mod. 290; *Smith et ux., v. Stafford*, Hobart's Rep. 377. In the case of *Milbourn v. Ewart et al.*, 5 Term Rep. 381, the court of king's bench was unanimous in the opinion that a bond conditioned for the payment of money, after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit, if she should survive, is not released by their marriage. Then why may not the wife, or rather the widow, sue upon such an obligation? It is not released; it is still binding, and we are aware of no principle which deprives her of her remedy on such an obligation. The judgment below is affirmed; the other judges concurring.

JONES' ADMINISTRATOR, Appellant, v. COVINGTON, Respondent.

1. A. by instrument of writing not under seal, executed in the year 1838, conveyed to B. a negro slave; A. retained possession of the slave until his death in 1853; *held*, that B. had no title to the slave.
2. Under the law as it stood in 1838, (see R. C. 1835, p. 588,) in order to perfect a gift of a slave so as to divest the title of the giver even as against himself, there must have been either a change of the possession or a recorded instrument of the character designated in the statute. Per LEONARD, J. (SCOTT, J., nonconcurring in this doctrine, holding that a deed of gift of a slave, under seal, will pass a title to such slave, notwithstanding the said statute. The common law respecting gifts was in force, notwithstanding the statute.)

Appeal from St. Louis Court of Common Pleas.

This was an action to recover a slave which had originally belonged to one John Howdeshell, who, on the 10th of Sep-

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tember, 1838, made the following bill of sale: "Know all men by these presents, that I, John Howdeshell, of the state of Missouri and county of St. Louis, have this day bargained and sold unto Nathan Jones, of the state and county aforesaid, two black children, slaves, one called Jane, a girl, seven years old, the other called Lewis, a boy, four or five years old, for and in consideration of the services and parental affection existing towards Sarah Jones, wife of the aforesaid Nathan Jones, to have and to hold as their property and for their use forever. Given under my hand this 10th day of September, 1838. [Signed] John Howdeshell."

This suit was brought in April, 1853, by plaintiff, as administrator of Nathan Jones, against Covington, to recover the boy Lewis, who had been hired to defendant by the administrator of said Howdeshell. It was in evidence that at the time of the execution of this writing, it was delivered to one John Jones, in charge, for the benefit of Sarah Jones; he to keep the same until the death of Howdeshell, and then to carry out his (Howdeshell's) intentions; that Howdeshell died in 1853; that the said John Jones, on learning, in 1849, that Howdeshell had made his will, delivered the said instrument of writing to either Nathan Jones or his wife Sarah; that Howdeshell retained possession of said slave, Lewis, until his death in 1853, there never having been a delivery of said slave to either Nathan Jones or his wife Sarah Jones. Upon this evidence the court ruled that plaintiff could not recover.

Gantt, for appellant.

Cline & Jamison, for respondent.

LEONARD, Judge, delivered the opinion of the court.

The question here is, as to the effect of the alleged instrument of gift under which the intestate claimed the slave in controversy, from Howdeshell, the original owner.

This instrument was not a recorded deed, and the possession of the property given did not accompany it, but remained with

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the donor until his death, and the slave was then hired by his administrator to the defendant. The transaction between Howdeshell and the plaintiff's intestate was an imperfect gift, remunerative it may be for services rendered, but still purely voluntary; and under the third article of the law of 1835, concerning slaves, was altogether ineffectual to effect a change of legal ownership, even as between the parties themselves for want of the solemnities there required. Under our law, as it stood when this transaction occurred, in order to perfect a gift of a slave, so as to divest the title of the giver, even as against himself, there must have been either a change of the possession or a recorded instrument of the character designated in the statute. The law is so written, and it is not pretended that either solemnity was observed here. There is no ground, therefore, for insisting that the gift transferred the title even in a controversy between the original parties. Our statute, which came here in 1804, is a copy of an ancient Virginia act, and the construction we now put upon it is the same given to the Virginia act in *Durham and wife v. Dunkly* (6 Rand. 14).

All of us concur in affirming the judgment; but Judge Scott does not concur in the grounds upon which it is here put.

SCOTT, Judge. There is no deed of gift in this case. The instrument claimed to have conveyed the slave is not under seal. There then being no seal and no actual delivery of the slave, the instrument amounted to nothing more than a contract to convey, and passed no property. In my opinion, a deed of gift, under seal, without actual delivery, will pass a title to a slave, notwithstanding the late statute concerning slaves. The common law respecting gifts was in force notwithstanding the statute, leaving it to operate in cases within its provisions. (*Swartz v. Chappell*, 19 Mo. 304.)

Conrad v. Belt's Adm'r.

CONRAD & BENNETT, Appellants, v. BELT'S ADMINISTRATOR,
Respondent.

1. Where evidence rejected is of too vague and indecisive a character to produce any effect on the finding of the facts by the court, the supreme court will not reverse the judgment of the court below.
2. To induce the supreme court to interfere with the finding of the facts by the lower court, such finding must be clearly wrong; it is not sufficient that, from the evidence, the finding might have been different; it must be a strong case.

Appeal from St. Louis Circuit Court.

Conrad & Bennett exhibited an account before the Probate Court of St. Louis county, against the estate of Francis T. Belt, claiming a balance due them of \$215 50. The Probate Court disallowed the account altogether. The cause was taken to the Circuit Court, which gave judgment in favor of plaintiffs for the sum of \$11 37, from which judgment they appealed to this court. The claim of plaintiff was for money received by Belt, defendant's intestate, while master of the steamboat Saluda, while plaintiffs were owners thereof. Belt afterwards purchased Bennett's interest, one-half, in said boat, and the question in this case was as to the amount of credit to which defendant is entitled for repairs paid for by Belt, his intestate, and by defendant as his administrator. Defendant claims that the whole cost of said repairs paid should be allowed as a credit on the ground that they were made while Belt was master and not owner of said boat; while defendants claim that said Belt's estate is entitled to a credit of only one half of the amount paid. The court allowed a credit of the whole amount, on the ground that the liability for the repairs was incurred before the purchase by Belt. On the trial before the Circuit Court, the following question and answer on a deposition offered in evidence by plaintiff, were rejected by the court, on motion of defendant: "Ques. Do you know whether or not Capt. Belt took possession of her (the steamboat Saluda) or exercised acts

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of ownership over her before she went on the docks? Ans. As I said before, Belt had been master of the boat, and I did not notice any material difference in his conduct." Defendant, on the trial, also gave evidence tending to prove that several accounts, for work and services upon the Saluda, and for supplies, had been proved and allowed against Belt's estate, amounting in the aggregate to \$882 81; that all of said accounts were incurred between March 21st and April 9th, 1852, (March 22 being the date of the bill of sale to said Belt, of one half of said boat,) and had been paid by the administrator of Belt. It does not appear that this evidence was noticed by the court in making the finding of the facts.

Krum & Harding, for appellants.

T. T. Gantt, for respondent.

SCOTT, Judge, delivered the opinion of the court.

As this case is submitted to us for a review as to the finding of the facts, we may look at the evidence rejected; and if we see that, if thrown into the scale of the plaintiffs, it would not induce us to disturb the finding, we would not be warranted in reversing the judgment on that account. The evidence rejected is of too vague and indecisive a character to produce any effect on the finding.

As to the account of moneys paid by the intestate, on account of the boat, and allowed in the Probate Court, we can not see how the plaintiffs were prejudiced by its introduction. The defence of the defendant was no set-off. The dispute was about the repairs done to the boat. The account filed by the plaintiffs admitted that defendant's intestate was entitled to a credit in respect of them, and the controversy was as to the amount. The defence only contested the correctness of the account as stated.

There was evidence sufficient to support the finding, and as the parties submitted the cause to the court for trial, waiving a jury, it must be a strong case to induce us to interfere with the

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finding. When a cause is submitted to a jury, this court will not entertain a writ of error on the ground that the verdict is against the weight of evidence. The present practice act allows a case to be made and brought here for a review on the finding as to the facts. In such cases, to induce this court to interfere, the verdict must be clearly wrong. It is not sufficient that, from the evidence, the finding might have been different.

With the concurrence of the other judges, the judgment is affirmed.

BEACHBOARD'S ADMINISTRATOR, Respondent, v. LUCE, Appellant.

1. Although parties to a suit may prove by their own oaths the loss or destruction of instruments in writing on which they rely, yet they can not be permitted themselves to testify as to the contents of such instruments.

Appeal from St. Louis Law Commissioner's Court.

This was a writ originally commenced before a justice of the peace on a promissory note for seventy dollars, made by the defendant, Luce, to Beachboard, the plaintiff's intestate. The defence relied upon by the defendant was a payment of the note. The defendant filed his affidavit of the loss of the receipt, given to him, the said defendant, by Beachboard in his lifetime, for the amount due on said note. Upon the trial, the defendant, Luce, was offered as a witness by his counsel, to prove the contents of said receipt. He was rejected by the court on the objection of plaintiff's counsel, and judgment given for the plaintiff for the amount of the note with interest. To the rejection of the defendant, as a witness, the defendant's counsel excepted, and brings the case here by appeal.

W. L. Sloss, for appellant.

P. C. Morehead, for respondent.

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LEONARD, Judge, delivered the opinion of the court.

The only question here seems to be, whether the court erred in refusing to allow the defendant leave to prove by his own oath the contents of a lost receipt, upon which he relied as evidence of the payment of the note sued on. From the necessity of the case, parties are allowed to prove by their own oaths the loss or destruction of written instruments, in order to let in oral proof of their contents; and this is as far as the law has gone. This was done here, and other evidence was then rightly required of the contents of the lost paper. What passed at the original trial, before the justice of the peace, did not change the rules of evidence applicable to the case in the law commissioner's court. The judgment is affirmed.

• MATTHEWS, Respondent, v. GLOSS, Appellant.

1. Where an appeal is taken from a justice of the peace in a proceeding under the landlord and tenant act, and the transcript is filed by the justice in the land court; *held*, that it is error to dismiss the appeal on motion of the appellee, on the ground that the recognizance stated the appeal to be to the law commissioner's court, a motion for leave to amend the recognizance having been made before the motion to dismiss was disposed of. The court should have permitted appellant to file a good and sufficient recognizance.

Appeal from St. Louis Land Court.

The case is sufficiently stated in the opinion of the court.

P. C. Morehead, for appellant.

C. Gibson, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was a suit before a justice of the peace, under the landlord and tenant law of St. Louis county, to recover possession of a certain tenement in St. Louis. On the trial before the justice, the plaintiff recovered judgment, and the defendant took

an appeal. The recognizance taken by the justice required the plaintiff to satisfy the judgment, if there should be one on a trial anew in the *law commissioner's court* of St. Louis county, instead of the Land Court. The transcript being filed by the justice in the Land Court, the appeal was there dismissed, on motion of the appellee, because "the recognizance specified the appeal to the law commissioner's court." While this motion was pending, the appellant moved the court for leave to amend the recognizance. This was refused, and the appellee's motion sustained.

The record shows that the affidavit for the appeal was made by Cecelie Lecompte, who claims to be the landlord of the tenant, Gloss. The recognizance is also subscribed by her and Rene Lecompte.

The Land Court erred in sustaining the appellee's motion to dismiss. That court should have permitted the appellant to file a good and sufficient recognizance, and ought to have overruled the motion to dismiss. The statute declares that "no appeal allowed by a justice shall be dismissed on account that there is no recognizance, or that the recognizance given is defective, if the appellant, or some person for him, will, before the motion to dismiss is determined, enter, before the court, into such recognizance as he ought to have entered into before the allowance of the appeal, and pay all costs that shall be incurred by reason of such defect or omission." (Justices' Courts, § 17, art. 8, R. C. 1845, p. 670.)

The judgment of the Land Court must, consequently, be reversed, and the cause remanded; the other judges concurring.

GOETZ, Respondent, v. AMBS, Appellant.

1. The supreme court will not grant a new trial on the ground that the verdict of the jury is against the weight of evidence.
2. Where, however, the damages awarded by the jury are excessive, and unwarranted, the supreme court will award a new trial, if the ends of justice will be subserved thereby.

Appeal from St. Louis Court of Common Pleas.

This was an action for an assault and battery. The petition charges various injuries to the person of plaintiff, and particularly an injury to one of plaintiff's eyes, caused by a blow of a whip, inflicted by defendant, by reason of which plaintiff underwent great pain, and was prevented from engaging in his business for the space of six weeks, and was subjected to an expenditure of seventy-five dollars, in and about endeavoring to be cured of the injuries inflicted. The damages were laid at \$5000. The defendant, in his answer, denied all the material allegations of the petition. The testimony offered by plaintiff and defendant was conflicting. That offered by plaintiff tended to prove that the defendant, who was proprietor of "Camp Spring," a place of resort for purposes of amusement, without provocation, struck the plaintiff a severe blow with the butt end of a whip, injuring the eye of plaintiff and so disabling him as to render it necessary that he should cease laboring at his trade, that of a stone cutter, for the space of five or six weeks; that plaintiff could earn at his trade from three to four dollars per day; that the physician's bill was between sixty and seventy dollars. The physician who attended upon plaintiff testified that the injury to plaintiff's eye was or might be permanent, and that sight might never be restored entirely. To this testimony defendant objected as incompetent and irrelevant under the petition. Objection overruled and exception taken. The testimony offered on part of defendant conflicted with that offered by plaintiff, and tended to prove that it was not the defendant who struck the plaintiff; that plaintiff was injured in a quarrel that arose at "Camp Spring," by some person other than defendant. The following instructions were given by the court: "1. If the jury believe from the evidence that the plaintiff was struck in his left eye by the defendant, with the butt end of a whip, which he held in his hand, they will find for the plaintiff. 2. If the jury find for the plaintiff, they should allow such damages as will compensate him for the expenses he

incurred in endeavoring to cure himself of the injury inflicted by the defendant, and for his loss of time in consequence of such injury, and, in addition thereto, may allow such further sum for exemplary damages or smart money as they may, under all the circumstances and facts, deem right. 3. If the jury believe from the evidence that the defendant did commit the assault and battery complained of, then the defendant can not, under the pleadings, set up any matter in justification for the same. 4. If there was a quarrel or general fight at the Camp Spring garden at or about the time plaintiff was injured, and the plaintiff did not participate therein, then that fact should not be considered as mitigating the damages, if the defendant intentionally struck the plaintiff in the manner charged. 5. If the jury believe from the evidence that any witness has wilfully testified falsely to any material fact, they should reject all parts of his testimony which are false, and are at liberty to reject his testimony altogether. It is the exclusive province of the jury to determine what weight should be given to the testimony of each witness." To the giving of these instructions the defendant excepted. The jury returned a verdict for the plaintiff for \$2000. A motion for a new trial was overruled, and plaintiff brings the case here by appeal.

Hudson & Thomas, for appellant.

Hart & Jecko, for respondent.

SCOTT, Judge delivered the opinion of the court.

This court does not interfere with the verdict of a jury on the ground that it is against the weight of evidence. If, however, upon the report of the evidence on a trial, we were warranted in granting a new trial, we do not know how we would resist such an application on this occasion. As a new trial will be granted on account of the excessiveness of the damages, we deem it inappropriate to make any comments on the case. Upon looking over the record, we are satisfied that the ends of justice will be subserved by granting a new trial; although the injury sus-

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tained was a serious one, we do not think the circumstances warranted so heavy a verdict.

The judgment is reversed, and a new trial ordered, with the concurrence of Judge Ryland.

BLUMENTHAL, Respondent, v. KURTH, Appellant.

1. Where a new trial is granted on the motion of defendant, on condition that defendant pay the costs, there is no irregularity in allowing the plaintiff to amend the judgment (as by giving judgment for the possession of land, in accordance with the verdict of the jury, where, through inadvertence, a judgment for costs alone had been entered) after the order for the new trial is made and before the costs are paid.
2. Where an order granting a new trial to a defendant, on condition of his paying costs, is after the lapse of several terms and before the payment of the costs by defendant, vacated on the motion of plaintiff; *held*, that defendant is not entitled to notice of this motion.

Appeal from St. Louis Circuit Court.

The facts are stated in the opinion of the court.

Krum & Harding, for appellant. 1. The Circuit Court committed error in vacating the previous entries, and at April term, 1843, rendering a different judgment against the appellant, without notice to him, and no appearance on his part, and that, too, after a new trial had been granted. 2. There was also error in vacating the order granting a new trial. This proceeding, too, at April term, 1854, was without notice to the appellant, and there was no appearance on his part. The amendments complained of were not as to matters of form, but of substance. (R. S. 1845, art. 6, p. 826; 7 Mo. 320; 8 id. 334; Tidd's Prac. 760.) 3. Notice should have been given of the motion to amend the record. (R. S. 1845, p. 826, art. 6; 1 Dunl. Pract. 295; 6 Call, 12.)

Dick, for respondent. 1. This appeal was not taken in time to be heard by this court. (Code of Practice, 1849, art. 19, sec. 8.) 2. The court committed no error in amending the

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record by making the judgment conform to the verdict. (1 Mo. 16, 110; 5 Burr. 2730; Hardin, 64; 4 Conn. 77; 3 T. R. 350; 2 Str. 786, 1132, 1156; 10 Maine, 278; 1 Tidd's Pract. 662; 2 id. 862-3; 5 Mo. 214; 19 Mo. 158, 415; 16 Mo. 225; Sess. Acts, 1849, p. 87; R. C. 1845, p. 827, 906; 1 Gall. 260; 2 Bibb, 88; Grah. Pract. 667; 6 Ired. 425; 5 Ired. 12; 18 Maine, 186; 1 Humph. 379, 380; 1 Scam. 122; 3 Ala. 609, 632.)

SCOTT, Judge, delivered the opinion of the court.

This suit was brought to the November term, 1851. At the April term, 1852, on the 6th day of October, there was a trial in the absence of the defendant, and a verdict was rendered for the plaintiff. On the day following, a judgment for costs was entered against the defendant. During the same term, on the 16th October, the judgment against Kurth was set aside, on the condition of his paying the costs of the trial, and the plaintiff took leave to file an amended petition on or before the next term of the court. At the November term, 1852, on the 18th of December, the defendant moved the court to set aside so much of the order granting him a new trial as imposed the condition of the payment of costs. At the same term, on the 13th February, 1853, this motion was overruled, and the defendant excepted, and, in the following vacation, on the 12th March, obtained an appeal from the clerk of the court to the Supreme Court. Afterwards, at the April term, 1853, on the 22d October, the plaintiff, on motion, had his judgment amended so as to make it formal. At the April term, 1854, on the 11th of May, the plaintiff moved the court to vacate the order setting aside the first judgment and granting a new trial, because the defendant had failed to comply with the condition on which it was granted, and afterwards this motion, on the 16th of May, was sustained, and the motion for a new trial was overruled, and the defendant appealed to this court.

In England, the payment of costs, on the granting of a new

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trial, is conditional, and until the order for the payment of them is complied with, no new trial can be had. (Tidd, 824.)

As the new trial was granted conditionally, there was no irregularity in the plaintiff in amending his judgment after the order for the new trial was made and before the costs were paid. The amendment was a formal one, and could not possibly have prejudiced the defendant. It was due to the orderly administration of justice, that it should have been done. Notice would have been of no avail to the defendant, and the 6th article of the practice act, (R. C. 826, sec. 2,) is not applicable. When the order granting a new trial was vacated, the defendant was or ought to have been in court; he was aware of his default; his conduct had been vexatious, and there is no reason why he should have had notice of such motion. After the great delay in the payment of the costs, he must have known that he would not always be permitted to keep the plaintiff waiting on him.

The other judges concurring, the judgment will be affirmed.

MUSICK, Respondent, v. CHAMLIN, Appellant.

1. A justice of the peace has jurisdiction of a suit to recover the balance of the purchase money of land, where the credits allowed bring the amount claimed within the sum for which the justice can entertain suits.

Appeal from St. Louis Law Commissioner's Court.

The facts sufficiently appear in the opinion of the court.

Cline & Jamison and *Woods*, for appellant.

Burke and *Page*, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was a suit commenced before a justice of the peace for the balance of the purchase money for a tract of land sold by plaintiff to defendant. The account was filed with the justice,

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stating the original price of the land sold, and giving credit for various amounts, reducing the indebtedness down to the sum of \$84 63.

The plaintiff obtained judgment before the justice, and an appeal was taken to the law commissioner's court. There the defendant filed a motion to dismiss the appeal, assigning various reasons therefor—one of which was, that the justice of the peace had no jurisdiction of the cause of action, and, consequently, that the law commissioner's court could not entertain the appeal. This motion was overruled and excepted to.

Upon a trial in the law commissioner's court, judgment was again rendered for the plaintiff for the sum of \$60 27. A motion for a new trial being made and overruled, the defendant appealed to this court.

In looking over the whole record, with its various motions and reasons therefor, I can find no sufficient error to authorize this court to reverse the judgment. There is nothing in all the various reasons assigned for dismissing the appeal. The balance of the purchase money was within the magistrate's jurisdiction, and there is no reason why he should resort to the Circuit Court or Common Pleas, when a justice's court had jurisdiction of such a case. Nor is there any thing in all the various instructions prayed for by the defendant, and which the law commissioner refused.

The whole cause of all the complaint and of all the opposition to the trial in the law commissioner's court is plainly attributable to the fact that defendant, in order to obtain the relinquishment of the dower of the wife of the plaintiff in and to the land sold by plaintiff to the defendant, he (the defendant) had to pay to the wife the sum of fifty dollars. The plaintiff had nothing to do with this money, as the record shows, nor is he responsible for it. If the defendant thought proper to buy the good will of the wife, and thereby obtain her relinquishment, rather than resort to an action against the plaintiff for breach of contract, let him not afterwards object to the paying of the balance due to the plaintiff for the land.

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Upon the whole record, we think justice has been done, and judgment given for the right party. Let it therefore be affirmed; the other judges concurring.

POMEROY & ANDREWS, Respondents, v. SIGERSON, Appellant.

1. P. & A., partners, commission and forwarding merchants in St. Louis, advertised that they would make liberal cash advances upon produce placed in their hands for sale in New Orleans, New York, or Liverpool. J. S. delivered to P. & A. 386 barrels of lard with the request that it should be "sent forward from New Orleans to Liverpool, provided your (P. & A.'s) correspondents are in a situation to do that kind of business, and have correspondents that they are satisfied will protect their and our interest." P. & A. made advances upon said lard, and shipped the same to their correspondents in New Orleans, with instructions to ship the same to Liverpool, provided it could be drawn upon so as to cover the advances made to J. S. by P. & A., with charges, &c., otherwise to sell the same in New Orleans. The New Orleans house, not being able to secure advances so as to cover the advances of P. & A., sold the lard, and failed soon after, not having rendered any account of the proceeds. *Held*, in a suit by P. & A. against J. S. to recover the advances made by P. & A., that it should be left to the jury to determine whether it was not the understanding of the parties that J. S. should look to P. & A. for the money arising from the sale of the lard; in short, whether P. & A. were not the agents for the sale of the lard, and those whom they employed, their sub-agents, for whose conduct they are liable.
2. An arrangement between forwarding and commission merchants in St. Louis, and their correspondents in New Orleans, that on all sales of produce shipped by the St. Louis house to that in New Orleans, one per cent. of the usual commission of 2½ per cent. should be returned to the St. Louis house, does not constitute the two houses partners.
3. In suits commenced under the old system of practice, the rules of evidence, as they then existed, will govern in ascertaining the competency of a witness.

Appeal from St. Louis Circuit Court.

This case was formerly before the Supreme Court, and is reported in 13 Mo. 360. Being then reversed and remanded to the Circuit Court, a new trial was there had, which resulted in a verdict and judgment for the plaintiffs. At the trial, it was

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in evidence that the plaintiffs were commission and forwarding merchants in St. Louis, and had advertised that they would make liberal cash advances upon produce placed in their hands for sale in New Orleans, New York, or Liverpool. In the year 1848, the defendant, at different times, from the 1st to the 18th of April, delivered to plaintiffs, pork, bacon and lard, to be shipped by them and sold. Among other lots delivered were 410 barrels of lard, 386 barrels of which were destined for Liverpool, as is shown by the following letter: "St. Louis, April 10th, 1848. Messrs. Pomeroy & Andrews: Gents.—I herewith hand you dray tickets and invoice of 410 barrels of lard, 386 of which is a prime article and in fine order, and which I wish sent forward direct from New Orleans to Liverpool, provided your correspondents are in a situation to do that kind of business, and have correspondents that they are satisfied will protect their and our interest. The twenty-four barrels marked 'lard' is an article manufactured from heads and will be found quite a common article, which I wish them to sell in New Orleans or ship to Boston, as they may think best," &c. This direction, in the form of a letter, was signed by John Sigerson, defendant in this suit. The plaintiffs made advances upon the pork, lard, &c., amounting in all to somewhat more than \$6000, of which sum \$4000 were advanced by plaintiffs on the 410 barrels of lard.

There was also evidence tending to prove that there was due plaintiffs a balance of \$474 12, on a partially executed contract for the purchase of a quantity of pork by plaintiffs for Andrews & Bro., of New Orleans, on which contract plaintiffs had paid to defendant \$3500. The whole amount claimed by plaintiffs in the present action, including the above balance, was, after allowing credits, \$6883 84.

It was in evidence that the property put by defendant, Sigerson, in plaintiffs' hands for shipment and sale, (except six casks of bacon, of which plaintiffs admitted the sale and gave defendant credit for the proceeds in their account,) was shipped by plaintiffs to the commercial house of Andrews & Bro., of

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New Orleans. The house of Andrews & Bro. failed soon after the shipments to it, and both members of the house committed suicide. There was much evidence introduced tending to show that at the time of the shipments the said house was in good credit and standing; there was also some testimony leading to an opposite conclusion. There was also evidence tending to show that the 410 barrels of lard were sold by Andrews & Bro. in New Orleans, previous to their failure. It did not appear, however, what was done with the other property shipped to Andrews & Brother.

On the day (April 12, 1848) defendant delivered the 410 barrels of lard to plaintiffs (accompanying the delivery with the letter of instructions above set forth), plaintiffs wrote to Andrews & Brother, enclosing the letter of instructions above set forth, and a bill of lading of the 410 barrels of lard. The letter is as follows: "St. Louis, April 12th, 1848. Messrs. Andrews & Brother: Enclosed find bill of lading for 410 barrels of lard, shipped per account of John Sigerson, with copy of instructions from him. It is his wish to have it shipped to Liverpool, providing it can be done so as to protect our interest and his; and if not, to be sold to best advantage in New Orleans. I expect it is a fine article, all except the twenty barrels. If we can negotiate, we shall have to advance about \$4000 on this shipment. So if it can be shipped to Liverpool and drawn upon by you to make our advance good, with all charges, for receiving and forwarding, better send it through, as he is very anxious to have it sent to Liverpool; and we would like to know how we are to do business with persons wishing to ship direct to Europe through your house, as there may be considerable business of that kind to do. We could not say positively to J. Sigerson that it would be sent to Liverpool, as we were not fully instructed by you about such consignments. Please answer this immediately, that we may advise him what is done. Yours truly, Pomeroy & Andrews." Andrews & Brother wrote to plaintiffs in reply to this letter. Their letter is dated April 19th, 1848, and contained the following pas-

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sage: "Make no positive arrangements for shipping from here where you advance. We have offered the lard to all those we would ship to their houses in Liverpool, and they won't any of them advance over three cents per pound." This would have amounted to less than the sum advanced by plaintiffs on said lard. This letter was shown to defendant, J. Sigerson.

It was in evidence that the plaintiffs raised all the money advanced by them to defendant, by drawing bills on Andrews & Brother, which were sold to L. A. Benoist & Co., bankers at St. Louis; and a bill for \$4000 drawn against the shipment of lard, was introduced in evidence, with the proof that it belonged to plaintiffs, they having settled with Benoist & Co., and given their notes. There was no evidence given as to whether the bills drawn against the other shipments were paid or not by Andrews & Brother. There was evidence tending to prove that at the time of their failure the house of Andrews & Brother was insolvent.

It also appeared in evidence that there was an arrangement between plaintiffs and Andrews & Brother, that on all shipments by plaintiffs to them, one per cent. commissions on sales should be returned to plaintiffs; the usual commissions on sales being $2\frac{1}{2}$ per cent.; that is, Andrews & Brother charged one and one half per cent. in their accounts with plaintiffs, instead of the usual commission, to-wit, $2\frac{1}{2}$ per cent., remitting the one per cent. in favor of plaintiffs. This was plaintiffs' only compensation for shipping, advancing, &c., in St. Louis.

At the trial, plaintiffs called as a witness Louis A. Benoist, member of the firm of L. A. Benoist & Co., bankers; defendant objected to his being sworn on the ground of his interest in the result of this suit. He was excluded. The plaintiffs then offered to read a deposition of said Louis A. Benoist, to the reading of which defendant also objected, on the ground of interest, and to support the objection, read to the court the deposition itself, in which it is stated by said Benoist that it was understood between plaintiffs and himself that if plaintiff recover judgment in this suit, against the defendant, the money is

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to be paid to the house of L. A. Benoist & Co. Defendant also read to the court an assignment by Pomeroy & Andrews, plaintiffs, to L. A. Benoist and James S. Thomas, of the first judgment obtained in this cause. This assignment was dated March 11th, 1849; the deposition was taken October 20, 1848. The court overruled the objection, and permitted the deposition to be read. This suit was commenced under the old practice.

There was evidence tending to show that if the 386 barrels of lard had been sent to Liverpool, a large profit would have been made thereon.

The court, on the motion of plaintiffs, gave the following instructions: "1. It is for the jury to ascertain from all the proof in the case, whether there was any violation of the defendant's instructions on the part of the plaintiffs in the transactions in question; if they did violate these instructions, then the jury will deduct from the claim of plaintiffs such damages as the defendant has proved to their satisfaction he sustained by reason of plaintiffs' violation of his instructions. But if they find, on the contrary, that there was no violation on the part of the plaintiffs of defendant's instructions, and that they acted in good faith, and with usual care in the premises, and that no part of the proceeds have ever been received by the plaintiffs, after the exercise of due diligence, and also find that after a reasonable time and notice to defendant this suit was brought, then the plaintiffs are entitled to recover the charges in account made by them against John Sigerson, which they may have proved to the satisfaction of the jury. 2. If the jury find that the agreement respecting one per cent. between the houses of Andrews & Bro. and Pomeroy & Andrews, was merely a stipulated compensation and inducement for sending them business and for their services in this respect as commission merchants, then there is no liability on the part of Pomeroy & Andrews, as co-partners, with the New Orleans house."

The defendant asked and the court gave the following instruction: "1. The plaintiffs can not recover the advances made by them, without showing the disposition made of the

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goods advanced upon, and that they have not been repaid their advances out of the goods or their proceeds."

The court refused the following, asked by defendant: "2. When a consignment is made to a commission merchant, with conditions and instructions accompanying the same, the acceptance of it by such commission merchant is an assent to such conditions or instructions; and if the jury find defendant consigned to plaintiffs or their commission merchants 386 barrels prime lard and accompanied the same with a note in writing, to the effect that he wished the lard sent forward direct from New Orleans to Liverpool, provided the correspondents of plaintiffs were in a situation to do that sort of business, and had correspondents who they were satisfied would protect the interests of plaintiffs and defendant, and that the plaintiffs did, after learning the contents of said note, accept the said consignment; that by such acceptance the plaintiffs did by force of law become bound by the conditions and instructions contained in said note, and did agree with defendant that their correspondents were in a situation to do that sort of business, and had such correspondents as were mentioned in said note, and that it was the duty of the plaintiffs, after receiving said consignment, to cause the same to be sent forward to Liverpool for sale without unreasonable delay. 3. If the plaintiffs have violated their agreements with defendant or disobeyed his instructions in regard to the several consignments, or any one of them shown by the evidence to have been made by defendant to them, and loss has ensued to the defendant therefrom, the plaintiffs are not entitled to recover their advancements sued for in this action, without deducting the loss so sustained. 4. If the jury find that plaintiffs accepted the consignment of 386 barrels of lard, with instructions and conditions such as are mentioned in defendant's note to plaintiffs, dated April 12, 1848, and plaintiffs on the same day forwarded the same to New Orleans to their correspondents, Andrews & Bro., and instructed them not to ship the same to Liverpool unless they could draw on it so as to make good the advances of plaintiffs, with all charges for receiving

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and forwarding, and otherwise to sell the same in New Orleans, they will find that said plaintiffs violated the instructions of the defendant, in so instructing their then correspondents in New Orleans, and are responsible for all the damages that did ensue. 5. If the plaintiffs held themselves out to the public as prepared to make advances on produce put into their hands for sale in Liverpool and received a consignment afterwards from defendant for that purpose, with the understanding that they (plaintiffs) had correspondents in a situation to do that sort of business, and that such correspondents had other correspondents who they were satisfied would protect the interests of both plaintiffs and defendant in the contemplated shipment to Liverpool, and such was not the fact, the jury will find that plaintiffs have acted in bad faith, have violated their agreement with defendant, and are responsible for all the damages that did ensue. 11. The defendant moves the court to instruct the jury that if the plaintiffs received consignments of produce from the defendant, as his commission merchants, and agreed to forward the same, under the instructions of the defendant, for a market, and to cause the same to be sold by themselves or their correspondents, and the same was sent by plaintiffs to certain correspondents of theirs in New Orleans, the house of Andrews & Bro., and that the plaintiffs sent the same to said A. & Bro., in New Orleans, because they were to do so by arrangement previously made between the said plaintiffs & Andrews & Bro., wherein the said Andrews & Bro. were to divide the commissions arising from the same with plaintiffs, the jury will find that said Andrews & Bro. were the sub-agents of the plaintiffs, and that the plaintiffs are liable for any amount of the proceeds of said sales received by them, and for any other act of Andrews & Bro. which may have been injurious to defendant."

There were other instructions asked on the part of defendant and refused by the court, which it is unnecessary to set forth. The jury rendered a verdict for plaintiffs for \$3849 21.

Glover & Richardson and *Barton Bates*, for appellant.

1. The delivery of the lard to Pomeroy & Andrews was made

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upon the faith of their having the facilities named in the note of Sigerson to them, of April 12, 1848, for sending the lard to Liverpool. If they had no such facilities they should have refused to receive it. The legal effect of their accepting the lard, with the instructions contained in the above letter, was an admission that they possessed such facilities and would send it to Liverpool. This is what defendant's second instruction was intended to declare. Pomeroy & Andrews had advertised that they would make liberal cash advances on produce placed in their hands for sale in Liverpool. This advertisement placed them in the position of agents selling goods in Liverpool and making cash advances upon them for that market. Such being their position, the instructions accompanying the delivery are easily understood. Accepting the goods, they took them subject to the conditions contained in the letter. (4 Dall. 389; 3 Wash. C. C. 151; 1 Sandf. S. C. 360; 4 Johns. 402.) The court should have instructed the jury as to the legal effect of the instructions contained in the note of Sigerson to Pomeroy & Andrews, and should not have left it to the jury from "all the proof in the case" to be construed by them. 2. But granting that Pomeroy & Andrews were bound merely to use their best endeavors to send the lard forward to Liverpool, provided they could procure the requisite facilities, and did not by the act of accepting, under the circumstances, agree that they had the requisite facilities; did they do their duty under this view of the matter? or conform to the wishes and directions of Mr. Sigerson? They send the 386 barrels of lard to New Orleans, with Sigerson's note, inquire how this business is to be conducted, (showing that when they advertised to sell produce in Liverpool, they had made no arrangements at all to do it,) and then, without waiting any reply to their inquiries, direct a sale of the lard in New Orleans unless their advances and all charges can be raised by bills on it when shipped to Liverpool. Their duty was to send the lard to Liverpool, if honest and faithful correspondents could be procured. They agreed to do so. They did nothing toward procuring such cor-

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respondents. 3. Defendant's fifth instruction was erroneously refused. 4. The agreement between Pomeroy & Andrews and Andrews & Bro. constituted them partners as to goods consigned to the latter from under such agreement. (1 Smith's Lea. Cas. p. 600, top.) 5. The eleventh instruction asked by defendant was improperly refused. If Andrews & Bro. were not partners, they were merely the sub-agents of Pomeroy & Andrews, receiving a compensation of $1\frac{1}{2}$ per cent. commission from them.

Field & Kasson, for respondent. 1. The second instruction asked by defendant entirely overlooked the *proviso* contained in Sigerson's note to Pomeroy & Andrews. That letter did not *require* the lard to be sent forward to Liverpool. A discretion was given to the consignees in New Orleans. The letter shows no desire on Sigerson's part to have the lard go forward at all unless plaintiffs' correspondents in New Orleans did that kind of business; nor unless they also had correspondents in Liverpool, who would "protect their and our interest." By this letter, Sigerson recognized an existing interest in Pomeroy & Andrews, of St. Louis, and an interest to exist in A. & Bro., of New Orleans. This interest was created by the advance made on the lard. Before they, by mercantile usage, could be obliged to forward it to Liverpool, they were also entitled to be secured for their advances, and freight and charges. The published advertisement of plaintiffs is wholly irrelevant here, in the face of the express arrangement. Defendant's instruction, No. 2, gives a wrong construction to Sigerson's letter. Sigerson knew as fully respecting the house of Andrews & Brother as plaintiffs, and knew it was doubtful if the lard could be sent forward, and knew it could not be unless the market were such as to admit of its being drawn against to cover advances and charges and freight. This letter of April 12th shows this. 2. There was no copartnership existing between plaintiffs and Andrews & Brother. (See 1 Smith's S. C. 836, top page; 3 Wils. 40; 1 Camp. 329; 2 H. Bl. 590; 4 Esp. 182; 4 M. & Sel. 240; 6 Metc. 92; 3 C. B. 32.)

3. Defendant's instruction 11 was properly refused. There was no evidence whatever of any agreement between Pomeroy & Andrews and Andrews & Brother to the effect that the former were bound to send all their consignments to the latter. If Andrews & Brother were the sub-agents of Pomeroy & Andrews, they were sub-agents in the sense that all correspondents are, where a distant market is sought, and not in any such sense as that implied in the instruction above referred to. Andrews & Brother were as much agents of Sigerson as of Pomeroy & Andrews. 4. The deposition of Benoist, taken before his disqualification by taking the assignment of the judgment, was properly admitted. (1 Greenl. Ev. § 168.)

SCOTT, Judge, delivered the opinion of the court.

In our opinion, this cause has not been tried on the real point involved in it. That point is, whether Pomeroy & Andrews received the produce of Sigerson as mere forwarding agents, or whether, under their advertisements in the newspapers, it was placed in their hands for sale. Or, in other words, was it the understanding between the parties that Sigerson should look to Pomeroy & Andrews for the money arising from the sale of his produce; or was he bound to look to the agent Pomeroy & Andrews might employ, without knowing who he was? Suppose the produce had been forwarded to Liverpool and the proceeds of the sale made way with by an insolvent agent there: to whom would Sigerson have looked for his produce—to Andrews & Brother, or to Pomeroy & Andrews? It can make no difference that the directions of Sigerson could not be complied with. If the produce was placed in the hands of Pomeroy & Andrews, to be sold in a particular way, their inability to comply with the directions would not vary the undertakings they assumed at the outset. If Pomeroy & Andrews were liable to Sigerson for the proceeds of the sale when they received the produce, they remained liable, notwithstanding their inability to sell it, as they were directed. The fact that Sigerson did

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not object to the arrangement made by Pomeroy & Andrews with Andrews & Brother, respecting the sale of the lard, does not prove that Sigerson released them from liability as his agents for the sale of it.

There were facts and circumstances in the case which should have been submitted to the jury, with a direction to determine whether Pomeroy & Andrews were not the agents for the sale of the lard, and that those whom they employed were their sub-agents, for whose conduct they were liable. This is a question for the jury, and we express no opinion in relation to it.

As the first instruction given for the plaintiffs was expressed in such a way as to exclude this view of the case from the consideration of the jury, the judgment must be reversed.

The facts, as proved, did not, according to the recent decisions, constitute a partnership between the parties.

As this case was commenced under the old system of practice, the rules of evidence, as they then existed, will prevail in ascertaining the competency of witnesses. To disqualify a witness, he must be legally entitled to payment out of the fund. A mere expectation of payment, however strong, if not amounting to a legal right, has been held insufficient to render a witness incompetent. (1 Greenl. 460.) This is said in reference to the deposition of Benoist.

Judge Ryland concurring, the judgment is reversed, and the cause remanded.

McEVERS, Respondent, v. STEAMBOAT SANGAMON, Appellant.

1. A barge was hired of A. by a steamboat, and it was agreed in writing that on the giving of notice the barge should be delivered up to A., "with the understanding that if froze up in the ice the sum above mentioned (eight dollars per day) is not to be paid, but only for the time the barge is in actual service, subject to his order, by giving notice one trip previous to leaving port, and is to be delivered in good order, the usual wear and tear excepted." The barge was destroyed by the ice in the Mississippi, without

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fault on the part of the defendant. *Held*, that the steamboat was not liable on the contract for the non-delivery of the barge. Whether the steamboat assumed the obligation to return the barge at all events, and notwithstanding any overpowering force, is a question of intent, to be determined by a proper construction of the terms of the contract. (Scott, J., dissenting.)

Appeal from St. Louis Circuit Court.

This was an action brought by McEvers upon the following instrument of writing: "This is to certify that I have hired of Mr. T. L. McEvers his barge called the 'Lightfoot,' for the sum of eight dollars per day, and I am to deliver it to him at Montezuma, he paying for the towing of the same at the rate of thirty dollars, with the understanding that, if froze up in the ice, the sum above mentioned is not to be paid, but only for the time the barge is in actual service, subject to his order, by giving notice one trip previous to leaving port, and is to be delivered in good order, the usual wear and tear excepted. St. Louis, December 20th, 1853. Steamboat Sangamon, L. A. Calvin, master, per C. N. Golding, clerk."

The breach assigned was the failure of defendant to deliver up the barge to plaintiff according to the terms of the contract. Upon the trial, evidence was offered on the part of defendant to show that the barge was lost by the breaking up of the ice in the Mississippi river, without any fault or negligence on the part of the officers or agents of defendant. This evidence was rejected, and, on the motion of plaintiff, the court gave the following instruction: "If the jury believe from the evidence that the agents of defendant hired the plaintiff's barge to be used in connection with defendant in navigating the waters of this state, that the agents of defendant took possession of the barge for the above use, and that the barge was sunk and lost by the ice in the Mississippi river, while in possession of defendant or his agents, plaintiff is entitled to recover."

There was a verdict for plaintiff, and defendant brings the case here by appeal.

Hudson & Thomas, for appellant. 1. The agreement given in evidence by plaintiff, imposed upon defendant the

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same obligations the law imposes upon a bailee for hire. (Sto. on Bailm. § 33 and 36.) The agreement does not import an absolute agreement to return and deliver up the barge at all events. The parties did not intend that the defendant should be made liable as an insurer. Inevitable accident would relieve a bailee from the consequences of a failure to perform the agreement. (See *The People v. Manning*, 8 Cow. 297; *Carpenter v. Stevens*, 12 Wend. 589; *The People v. Bartlett*, 3 Hill, 570; 6 Mo. 323; 8 Mo. 33; 10 Mo. 568.)

Reber, with whom were *Hart & Jecko*, for respondent. The court properly rejected the evidence tending to show that the barge was destroyed by inevitable accident. (16 Mo. 484; *Chitty on Con.* 734.)

LEONARD, Judge, delivered the opinion of the court.

The steamboat *Sangamon* hired the plaintiff's barge (the contract being in writing) at eight dollars a day, excluding the time it might be frozen in the ice, to be returned to plaintiff at *Montezuma* at any time, upon reasonable previous notice, and "delivered in good order, the usual wear and tear excepted." The suit is for the non-delivery, pursuant to the contract; and one defence set up in the answer is, that the barge was destroyed by an overpowering force—the ice in the Mississippi river—without any fault on the part of the defendant. This defence was struck out upon the objection of the plaintiff, and proof to the same effect, offered by the defendant upon the trial, was excluded.

If there had been no obligation upon the boat for the return of the barge, other than what the law implied upon the bailment, from the transaction itself, this defence, it is admitted, would have been sufficient. But it is insisted that here the party imposed the duty upon himself by a special contract, and therefore took the risk of such casualties; the distinction being between a duty imposed by law and one imposed by the parties themselves. We are told that by the civil law, when a

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person enters into an obligation to do a particular thing (unless it be of the essence of the contract, that a risk is incurred on the one side or the other), and is prevented from doing it by accident or an overpowering force, there is no ground for claiming damages for the non-performance. (*Henderson v. Stone*, 1 *Martin*, 641.) The object of both the civil and common law, in the matter, is to ascertain the intention of the parties, and execute their contracts accordingly. If it were the intention of the boat here to make itself responsible, in case the barge was destroyed without any fault, even by a natural force that could not be resisted, the matter relied upon would, of course, be no defence; but the question is, whether this was the intention. It is argued, however, that this is the interpretation our law gives to an undertaking for the performance of any particular act, and that the courts are bound to adhere to this construction, no matter what may be thought of the propriety of it, as a rule likely to carry into effect the real intention of parties. An examination of the cases, however, we think, will show that there is no such inexorable rule applicable indiscriminately to the construction of all special undertakings.

In *Pollard v. Moffer*, (1 *Dall.* 210,) the covenant was to deliver up the demised premises (a house in Philadelphia), at the end of the term, "in good repair," and the British army had taken and held the city of Philadelphia until after the term had expired, and, during the time, taken possession of the house and committed the waste and destruction complained of. This was admitted as a good defence to an action for not returning the premises in good repair pursuant to the contract.

In *Young v. Bruces*, (5 *Littell's Rep.* 324,) where there was a special contract to return a hired slave, the court of appeals in Kentucky decided that the death of the slave excused the non-delivery; following in this matter, the cases in Virginia. (*Harris v. Nicholas*, 5 *Munf.* 487.) In *Perkens v. Reed*, 8 *Mo.* 33, and *Ellett v. Bobb*, 6 *Mo.* 324, this court went still further and decided that when a hired slave ran away, without any fault on the part of the hirer, that the latter was excused,

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and this decision corresponds with the decisions in Kentucky upon the same matter (*Keas v. Yervell*, 2 Dana, 249); and the ground upon which the latter decisions are put is, "that the casualty by which the slave is lost is a peril incident to the nature of such property, and, therefore, in contracts concerning it, that peril shall never be presumed to have been guarded against, unless so expressly stipulated."

It is true the hirer could not prevent the death in the first class of cases, nor the escape in the other class; yet, if his contract embraced these risks, he was bound to pay for the loss. Both cases, therefore, go upon the ground that there is no such imperative rule of construction applicable to contracts of this description.

The question here then is, was this risk within the engagement of the defendant, so that, no matter how the loss occurred, the party is bound, and we think it was not. Here is a general undertaking to return the property in good order, and it has perished without any fault on the part of the defendant by a natural force that could not be resisted, and we are of opinion that an undertaking to assume such a risk ought to be special and express, and so clear as not to admit of any other construction. Such is not the case here.

The hirer was even excused from paying for the use of the barge, if it should be frozen up; and if the plaintiff had been asked whether he expected pay for it, in case it should perish by the same overpowering force, can there be any doubt as to the answer he would have given?

Judge Ryland concurring, the judgment is reversed, and the cause remanded.

SCOTT, Judge. When the law creates a duty and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him. But when the party, by his own contract, creates a change or duty upon himself, he is bound to make it good, if he can, notwithstanding any accident by inevitable necessity; because he might have provided

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against it by his contract. This is a principle as well established in our law as any to be found within its folds. It has prevailed too long and exercised its influence in too many ways, now to be overthrown without much inconvenience and the causing of many future difficulties. This principle is a manifestation of the spirit of the race for whom our noble system of law was moulded; a spirit of bold, self-reliance, which scorns to resort to government for protection against events, whose occurrence might be obviated by the exercise of ordinary vigilance. It is this spirit which distinguishes the common from the civil law: a spirit, too, which distinguishes the people that are governed by the two systems of law. Too great a reliance on government for protection in matters against which the exercise of the faculties with which man is endowed by nature may guard him, begets a spirit of dependence which is inconsistent with that freedom of thought and action which should animate a self-governing people.

It would be a display of useless research to attempt a reference to the many cases in which the principle in question has been asserted and maintained. The books are full of them, and I conceive that there is no authority in the courts to depart from the law as it has been invariably understood. There is nothing whatever to distinguish this case from the many others which have occurred in the course of the administration of our laws; and if the principle is not adhered to in this instance, it must be regarded as overturned—an act to the performance of which the legislature is alone competent. There may be cases in which the application of the principle will effect complete justice between the parties. Who shall draw the line of distinction? Is not that the province of the law-maker? It is always safer, in a government of laws, to have fixed rules for the interpretation of contracts, than that every thing should be left to the discretion or sense of justice of the judge. Too much is already left to the discretion of the judge in our law, and the occasions for the exercise of such discretion should not be multiplied.

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FRANKLIN, Plaintiff in Error, v. STAGG, Defendant in Error.

1. A. having purchased certain lots in the city of St. Louis at an execution sale under judgments against B., brought suit against B. and also against C., in whom the legal title to said lots stood, asking that the title of C. might be divested and transferred to A. on the ground that the said lots had been conveyed to C. with intent to defraud the creditors of B. (of whom A. was one), and were thus fraudulently held by C. To this suit both defendants appeared, and B., in his answer, denied the fraud alleged, denied ownership in himself, and asserted full ownership in C. The court gave judgment for A., plaintiff, and by its decree vested the title to said lot in him free, and discharged of all claims in favor of either B. or C. *Held*, that this suit was a complete and final adjudication upon the title of B. to the lots in question, and that B. could not afterwards set up title thereto, either in his own behalf, or in behalf of his creditors, on the ground that A. acquired the property by making a fraudulent use of a judgment confessed by B. in his favor: the matter is *res adjudicata*.

Error to St. Louis Land Court.

The facts are fully set forth in the opinion of the court.

Munford, for plaintiff in error, cited *State v. Morton*, 18 Mo. 53; *Wood v. Jackson*, 8 Wend. 9; 2 Myl. & Cr. 602; 3 Edw. Ch. 20; 8 Page, 210.

W. L. Williams and *Glover & Richardson*, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

In November, 1849, Henry Stagg commenced his suit in the Circuit Court of St. Louis county against Joseph Fitch and Joseph F. Franklin. The plaintiff's petition stated that in June, 1849, F. O. Day conveyed to Fitch lot 259 in Wright & Chambers' Addition to St. Louis; that said conveyance was without any consideration moving from Fitch; was in fact without his knowledge; was for the benefit of Franklin, and made for the purpose of defeating the collection of judgments, which had been rendered in the courts against him, one of which was in favor of the plaintiff; that in August, 1849, John G. Weld

conveyed to Fitch another lot of ground in the city of St. Louis, being part of lot No. 282; that this conveyance was also without consideration from Fitch — was intended for the use of Franklin and made to defraud his creditors; that in November, 1848, said Franklin confessed judgment in favor of Fitch for \$3014; that no such sum was due from him to Fitch; that said judgment was confessed without the knowledge of Fitch and for the purpose of defrauding the creditors of Franklin; and if at the date of said judgment any sum whatever was due to Fitch, it had been paid in full prior to the conveyance by Day to Fitch. The dates and amounts of the several judgments, recovered by Franklin's creditors against him, were fully set forth. It was then stated that executions were regularly issued on judgments against Franklin, including the plaintiff's judgment, were levied on the lots in question, and that the lots were sold by the sheriff of the county of St. Louis to the plaintiff, who received his deed therefor, on the 3d day of November, 1849; that the legal title still remained in Fitch; and thereupon the plaintiff prayed that Fitch should be compelled to convey to him, or that the court would, by its decree, pass the title to these lots to the plaintiff.

The answer of Franklin was filed in December, 1849. It stated in substance that the conveyances by Day and Weld were not for his benefit; that he had no interest whatever in the property, and fully denied the alleged intent to hinder or defraud his creditors. On the contrary, he asserted that Weld and Day were the legal and equitable owners of the property, and had, for a valuable consideration, at his instance, conveyed them to Fitch on account of a debt which he owed Fitch; that said judgment was honestly confessed by him in favor of Fitch for a real debt; that he owed Fitch even a greater amount, and had no fraudulent motive in it; that the judgment in favor of the plaintiff was also confessed by him, and was merely to secure the plaintiff against liabilities he was under for him (Franklin); and that at the time of the sheriff's sale to the plaintiff, under said judgment and others, not over five hundred

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dollars were due on plaintiff's judgment. The answer then proceeded to state that long previous to the plaintiff's purchase, the lot conveyed by Weld to Fitch had been sold in good faith under judgment and execution against him to Weld, who held the sheriff's deed.

The answer of Fitch, filed in April, 1850, set up, substantially, the same defences, and concluded with a denial that plaintiff had any right in equity to coerce the payment of his judgment at the date of his purchase at the sheriff's sale.

On the issues made by these pleadings, the cause came to trial in February, 1853, and the finding was in favor of the plaintiff on all the material allegations in his petition, and therefore it was ordered, adjudged and decreed that the legal title to the said lots, pieces and parcels of land be and the same is hereby vested in the plaintiff (Henry Stagg), free and discharged of and from all claims of said defendants or either of them—Joseph F. Franklin being one.

The defendants took the necessary steps to obtain a review of the finding, but were overruled in the Circuit Court; they afterwards appealed and removed the record into this court, where errors were assigned and the cause argued and decided at the March term, 1853, and the finding of the Circuit Court, upon the evidence adduced at the trial, sustained and the judgment appealed from affirmed in all particulars. (Case reported 18 Mo. 299.) It is in this state of things that Joseph F. Franklin, who was defendant in the suit, the nature and result of which have just been stated, commenced the present action in the Land Court of St. Louis county, in which Stagg, who was plaintiff before, is made defendant.

The plaintiff in this present suit states in his petition as follows: "Plaintiff states that on the 8th day of May, 1848, the firm of Franklin & Perry drew a draft for \$2000 on J. L. Franklin, of New York; that to negotiate said draft, plaintiff got the defendant to endorse the same as an accommodation endorser; that the same was sold to one Hayes. Plaintiff states that on the 15th day of April, 1848, the firm of Frank-

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lin & Perry and the defendant made their joint promissory note for the sum of \$3000; that said note was negotiated and the money raised on it, one half of which was taken and used by the defendant, and the other by plaintiff; that said note had four months to run, and that the same was eventually sold to H. Crittenden. Plaintiff states that on the 6th of July, 1848, plaintiff executed three notes for \$500 each, one due in four, seven and nine months, and one other on the same day for \$200; that said notes were given to said Stagg and discharged by plaintiff, except the one for \$200, which was without a good and valuable consideration, and that the consideration for the said \$200 note entirely failed.

“Plaintiff states that not long after the indebtedness aforesaid was created, he became apprehensive of serious difficulties in his pecuniary affairs; that to indemnify the defendant against any loss on account of his liabilities, at the request of defendant, he executed to him, on the 25th November, 1848, his certain promissory note for the sum of \$5200; that the sole consideration of said note was to indemnify the defendant against the aforesaid debts; that said note was due one day after date; that the plaintiff, to indemnify the defendant, on the 29th November last aforesaid, confessed in the Court of Common Pleas of St. Louis county, a judgment in favor of the defendant for the sum of \$5400, said sum being considered sufficient to cover all costs, damages and expenses that might accrue on said liabilities. Plaintiff states that said judgment was confessed merely to give the defendant some security against said liabilities. Plaintiff states that on the day of the date of said judgment, the defendant executed to the plaintiff an agreement herewith filed, marked exhibit A, showing the object and purposes for which said note was given, and said judgment confessed as aforesaid.

“Plaintiff states that he discharged and took up said three notes of \$500 each, and that said judgment, in consideration thereof, was credited for said sum of \$1500. Plaintiff states that defendant had an execution issued on said judgment, and

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in February, 1850, collected on the same \$600 80 in cash. Plaintiff states that defendant took a transcript of said judgment and sent the same to Iowa, and had a tract of land attached as the property of the plaintiff, and sold the same, and purchased it for a sum greatly inadequate to its real value, and now claims to be the owner thereof; that the said piece of land is worth about \$2000. Plaintiff states that defendant issued an execution on said judgment, and had the same levied on two lots of ground in the county and city of St. Louis, state of Missouri, to-wit: A lot 80 feet front on Tenth and Eleventh streets, by 150 feet deep, a complete description of which will appear by reference to book R, No. 4, p. 276 and following, in the recorder's office of St. Louis county; second, a lot containing 18 feet front by 126 feet 3 inches in depth to an alley, it being so much of block No. 282 in said city, commencing at a point on the east line of Eleventh street, distant southwardly 25 feet from the north-east corner of said block; thence south with said Eleventh street 18 feet; thence east and parallel with St. Charles street, 126 feet 3 inches to an alley; thence north with said alley, 18 feet; thence west 126 feet 3 inches to the place of beginning. Plaintiff states that on the 29th October, 1849, the sheriff of St. Louis county sold the said lots as the property of the plaintiff, and that the same were purchased by the defendant; that he only gave for the first lot above described the sum of \$600, and for the other the sum of 344; that a credit was entered on said execution for the sum of \$575; that the balance of said sum of \$634 was applied to other executions then in the hands of the sheriff against the plaintiff; that said balance of \$59 was all that defendant paid in cash for said lots; that the sheriff executed to him a deed, and that he now holds possession of them under it; that they are worth about \$6000.

“Plaintiff states that the sale and purchase of said lots by the defendant as aforesaid is fraudulent and void, and if any title passed thereby he holds the same for the benefit of the creditors; that said judgment was confessed to indemnify him

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against. Plaintiff states that before the defendant purchased any of the property sold as aforesaid, and before he collected said sum of \$602 80 on said judgment against the plaintiff, he had taken up and discharged the three notes for \$500 each, and that the consideration of the \$200 note had entirely failed; that on the 25th March, 1849, plaintiff executed to defendant his two promissory notes, one for \$554 16 and the other for \$599 16, one due in six months, and the other in twelve months; that said notes were given in consideration of a part of Franklin & Perry's interest in the note for \$3000, dated 15th April, 1848, and which had been endorsed to H. Crittenden; that plaintiff had made an arrangement with said Crittenden to pay the balance of interest of Franklin & Perry in said note; all of which will more fully appear by a receipt of the defendant herewith filed, marked exhibit B. Plaintiff states that before defendant had collected money on said execution and sold the property as aforesaid, he had obtained an extension of time on said note for \$2000, dated 8th May, 1848, which was executed by Franklin & Perry and endorsed by defendant; that the same was endorsed to one Hayes, of Baltimore, and that the defendant had not paid any thing on the same; that he had an arrangement with the holder thereof by which suit was to be brought in his name; that judgment was rendered in his favor against Perry on the same; that if defendant ever paid any thing on said notes, it was after he had sold the property of the plaintiff and collected money on said judgment as aforesaid, and that what he has paid he has been enabled to do so by virtue of the property that he sold and the money collected on said judgment as aforesaid. Plaintiff states that after defendant got a judgment on said \$2000 note against the said Perry, that in July and August, 1850, and April, 1852, defendant coerced payments of said Perry on said judgment, amounting to the sum of \$2100. Plaintiff states that said sum of \$2100, recovered from Perry, and the sum of \$602 80 received in cash on said execution, and the real estate sold as aforesaid, worth about \$8000, would make about \$9702 80 that said

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defendant has realized on account of his liabilities that said judgment was confessed to secure him against.

“Plaintiff states that if said defendant has ever paid any thing on account of his liabilities as the endorser of Franklin & Perry on said debts, he is not advised as to what amount he has paid or to whom it was paid. He is informed and believes that if any thing has been paid, that it was only paid as the defendant received payment from said Perry, and as he coerced payment on said judgment against plaintiff; that a large amount of said debts, for which said judgment was confessed, still remains unpaid, the holder thereof having extended the same and given indulgence thereon. Plaintiff states that, with the interest that has accrued on the judgment that he confessed in favor of the defendant, there yet remains an apparent unsatisfied balance of about \$3000 on the same, for which the plaintiff is still liable to be further unjustly oppressed by the defendant.

“Now, the premises considered, the plaintiff asks that defendant may answer all the allegations of this petition to the extent of his knowledge, information or belief, and that an account be taken between plaintiff and defendant, and that said purchases, made as aforesaid, be declared to be in trust for the benefit of the creditors, whose debts said judgment was confessed to indemnify the defendant (as the security of Franklin & Perry) against, and that the defendant be made to account for all the money that he received on said execution, and for the payments made him by said Perry, and that the property be resold, and after giving the defendant a credit for all that he has actually paid in cash, on account of his liabilities as the endorser of Franklin & Perry, if he has paid any thing for them, that the money be received on said execution and the payments made him by said Perry be applied to meet said payments; and that if the same should not be sufficient, that then the proceeds of the property on a resale, or so much thereof be applied as will discharge what sums he may have actually paid as security as aforesaid, and the balance be applied to the payment of what may still be due on the debts for which the defendant was the

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endorser of the plaintiff; and if there should still be a residue, that the sum be applied to the payment of a judgment in favor of Joseph Fitch against the plaintiff, for the sum of \$3014, rendered in the Court of Common Pleas of St. Louis county, on the 2d day of November, 1848; that the two notes given by plaintiff to defendant, dated 23d November, 1849, amounting to \$1153 38, be delivered up to this court to be cancelled; that said judgment in favor of defendant against the plaintiff, for the sum of \$5400, be annulled, and that the plaintiff be discharged from any further liability on the same; and that said note for \$200, dated 6th July, 1848, be delivered up to this court, to be cancelled; and that the purchase by the defendant of said lots be decreed to be void, and that the deeds therefor be delivered up to this court to be cancelled; and finally, the plaintiff asks for such other and further relief and judgment as he may be entitled to in the premises."

The defendant's answer admits many of the plaintiff's allegations as to the matters of account embraced in his petition, but denies that he held the property fraudulently as to the plaintiff's creditors, and sets up and relies upon the proceedings and judgment in the former suit in bar of the relief prayed.

On the trial in the Land Court, the foregoing facts appeared in evidence, and the finding of the court was against the plaintiff, and judgment rendered accordingly. The plaintiff now brings the case to this court by writ of error.

We are at a loss to perceive the principle on which we are called upon to reverse this judgment. In the first place, there has been a solemn and final adjudication of the very question in issue. The record of the suit wherein Stagg was plaintiff and Fitch and Franklin defendants, given in evidence by Stagg in the present suit, must be regarded as a conclusive establishment of the facts that, by a contrivance between Fitch and Franklin, the property in dispute was conveyed to Fitch in fraud of Franklin's creditors; that it was so held by Fitch, when purchased by Stagg under executions against Franklin; and that, so far as Franklin and Fitch are concerned, all right,

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title and interest therein is vested in Stagg, free and clear of any claim on their part. This is the very least effect that can be assigned to the record. But it is in the face of this record that Franklin comes and prays that the property to which his title has been thus extinguished, shall be adjudged to him. This can not be imagined for a moment. But, in the second place, the plaintiff, it would seem, as if not entirely ignorant of the delicacy of his position (under all the circumstances) as plaintiff in a court of equity, bases his right to recover the property upon the ground that the facts mentioned in his petition are sufficient to constitute the defendant a trustee for his creditors. If this be so, and the right of the creditors are supposed to give a cause of action to this plaintiff, the question arises why it was not relied on in the former suit? or how it has survived the judgment rendered in that cause? It is to be observed, that when the plaintiff's creditors were seeking to subject this very property to the payment of their demands, he disclaimed all interest in the property, and came forward as a witness and testified that it belonged to Fitch. And now, after an adjudication that the conveyance to Fitch was in fraud of his creditors, one of whom has purchased the property and recovered it by an action to which the plaintiff was a party, he brings a suit, the purpose of which is to take the property away from the purchaser, and vest it in him as trustee for his creditors. When the creditors shall themselves apply to the court and make out a case for relief, it will be time enough to provide for them. And in such cases, it is the province of the court to select a person proper, in their opinion, to fill an office of trust and confidence. In the third place, if, as we have shown, the plaintiff can set up no right whatever to the lands in dispute, then there was no jurisdiction in the Land Court to authorize an examination of his account; and, of course, there can be none here. Upon the whole case, we are of opinion that the judgment should be affirmed, and the other judges concurring, it is so ordered.

 Lee v. Lindell.

LEE, Plaintiff in Error, v. LINDELL AND OTHERS, Defendants in Error.*

1. A widow's dower is divested by a sale in partition during coverture, although she is not joined with her husband as a party. (LEONARD, J., dissenting.)

Error to St. Louis Land Court.

Petition by the widow of Elliott Lee for dower. The plaintiff was married to Lee in 1824, in St. Louis. He died in 1851, without issue. From 1825 to 1837, he was seized in fee as tenant in common with others of the land in which dower was claimed. In 1836, a petition was filed for a partition of the land among the parties interested, according to their respective interests. The plaintiff was not a party to this suit, though her husband was. The proceedings resulted in a sale of the land under an order of court, to Jesse G. Lindell.

A demurrer to the petition, in which the above facts appeared, was sustained by the Land Court.

Hudson & Thomas, for plaintiff in error, in their brief, argued that a sale under a decree in partition did not divest the wife of one of the tenants in common of her dower in the land sold, where she was not a party to the proceeding. They cited 4 Kent's Comm. 50, 51; 1 Story's Equity, § 629, note 1; 1 Greenleaf's Cruise, marginal p. 166, § 34, p. 174, 172, § 24, p. 156, § 19; 1 Hilliard on Real Property, 148; Parks v. Brooks, 16 Ala. 529; Shearer v. Ranger, 22 Pick. 447; Porter v. Noyes, 2 Maine Rep. 22 (Greenleaf); 8 Alabama, 373; R. C. 1835, tit. "Dower," § 2, "Partition," § 2, 3, 14, 31; R. C. 1845, tit. "Dower," § 7; Denton v. Nancy, 8 Barbours' Rep. 618; 11 Barb. 152; Jackson and wife v. Edwards, 7 Paige's Ch. Rep. 406, 409; Matthews v. Matthews, 1 Edwards' Ch. Rep. 576; Van Gelder v. Post, Edwards' Ch. Rep. 577; 3 Paige's Ch. Rep. 653 to 657; Combs v. Young, 4 Yerger, 218, 225, 229.

* This cause was submitted to the court and decided at the March term, 1855. The report of it was prepared by Mr. S. A. BENNETT, former reporter.

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R. M. Field and *J. A. Kasson*, for defendants in error, in a printed brief, argued the following point: A judicial sale of lands in partition, under the statute law of Missouri, during coverture, and by virtue of regular proceedings to which the husband is, and the wife is not a party, conveys a title to the purchaser, divested of the wife's inchoate dower. (R. C. 1835, tit. "Partition," § 2, 3, 22; Statutes of 1807, 1815, 1817 and 1825, concerning dower; 11 Mo. Rep. 205; Melizet's Appeal, 17 Penn. State Rep. 454-5; Riddick v. Walsh, 15 Mo. Rep. 538; Moore v. City of New York, 4 Sandf. 461; Wilson v. Davisson, 2 Rob'n Va. Rep. 409.)

SCOTT, Judge, delivered the opinion of the court.

It is an incident to an estate held in common, that the tenant can be compelled to make partition. The estate must be acquired before dower can attach, and when it does attach to such an estate, it is taken subject to the contingency of a partition (Potter v. Wheeler, 13 Mass. 506.) When it is established that a proceeding in partition is binding on the wife, and confines her right to dower in the lot assigned to her husband, it would seem to follow as a consequence, that she would be bound, however the proceedings might eventuate, whether in a portion of the land being allotted to her husband, or in any other result. The wife must be bound or not at the time the suit is instituted, and she being bound by it, when the legislature took up the subject and directed that, instead of a partition in kind, if it should be made to appear that it be most advantageous to the parties interested that the land should be sold and its proceeds divided amongst the co-tenants, and the land is accordingly sold and a purchaser pays his money for it; on no principle can the ground on which the suit was instituted be varied, and the wife be exempted from the binding influence of the judgment, and be favored with a right to dower in the land sold, when, by the proceedings, as originally begun, they were binding on her. If this was a controversy between the

husband and wife, for the proceeds of the sale, there would be some justice in her claim ; but as between her and the purchaser, who has intervened in a proceeding which was binding on her, her claim has no foundation in equity. It may be that as between the husband and wife, the law should have provided some security for her dower out of the proceeds of the sale, but that such failure should be visited on the purchaser, would be a great hardship. The omission to make it could, on no principle, vary the nature of the proceeding, and make that of no force which was before binding.

The eighth section of the act concerning dower, which provides that no judgment or decree confessed by or recovered against the husband, shall prejudice the wife's right to dower, does not affect the present question. Partition is an incident to estates held in common. The making of partition among such tenants was provided for in the same code in which the section to which reference has been made is found. The binding influence of such procedure on the wife was known. The confining of the wife to the portion assigned her husband for her dower might prejudice the wife. A piece might have been allotted to him which would have been of no service to the wife for dower ; a lot wholly unimproved might have fallen to him. Suppose, in making partition, a sum of money was given to a husband for owelty of partition ; would this give his wife a right to defeat the partition made and recover her dower ? Suppose some of the shares are set off together, and others are sold and the proceeds distributed among the husbands, will their wives have right to dower in all the lands subject to partition, or will their rights be confined to the portion sold ? Innumerable difficulties attend this matter if we hold the proceedings in partition are not binding on married women. In a proceeding instituted to separate the rights of tenants in common, that each may have his own exclusively, would it not be strange that the law should require it to be done in such a way as might render necessary a recurrence to the same proceeding two or more times, according to the number of husbands, in order to effect

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the object, and thus, in making one partition, lay the foundation for many more, in relation to the very land divided; for each wife may sue for her dower in the land sold in partition upon the death of her husband, according to the argument.

We are aware that a contrary doctrine is held in some of the states, and the courts of New York held that the wife is not barred, unless she is made a party to the proceedings. There being no law requiring her to be made a party, it is not perceived how the arbitrary use of her name can impart validity to a proceeding which, without it, would not affect her. Nothing seems clearer than that if the law does not require a married woman to be a party to a proceeding, the making her one arbitrarily can not affect her rights. If the proceeding is such as does not bind her, the use of her name, without authority of law, can not produce such a consequence.

Under our law, the wife of the husband, who owns an interest in the land to be divided, is not required to be made a party in partition, no more than such wife is required to be plaintiff or defendant in an action of ejectment for lands claimed by the husband and in which she may have a right of dower. If the husband is competent alone to protect her interest in this action, why not in other actions in which her interests are the same? The question has never been made in our courts, whether a judgment in good faith against a husband in an action of ejectment was not conclusive on the wife claiming dower in the same land. (*Riddick v. Walsh*, 15 Mo.)

Judge Ryland concurring, the judgment will be affirmed.

LEONARD, Judge. I do not concur in this judgment. In my opinion, a partition sale does not divest the wife of her dower, unless she be made a party to the proceeding, in which event her contingent right may be secured upon the proceeds of the sale.

Sire v. City of St. Louis.—Cutter v. Waddingham.

SIRE AND WIFE, Plaintiff in Error, v. CITY OF ST. LOUIS, Defendant in Error.

1. Lee v. Lindell, ante, p. 202, affirmed.

Error to St. Louis Circuit Court.

SCOTT, Judge. This case is in all respects like that of *Pelagie Lee v. Jesse G. Lindell* and others, decided at the present term of the court. Judge Ryland concurring, the judgment will be affirmed. (Leonard, J., dissenting.)

NORMAN CUTTER, Respondent, v. WILLIAM WADDINGHAM, AND OTHERS, Appellants.*

1. The Spanish law superseded the French law in the district of Illinois (afterwards Upper Louisiana) as early as the year 1777.
2. By the Spanish law prevailing here as early as 1777, persons about to be married could not, by marriage contract, introduce a foreign law, (as for example the French law,) to regulate their property relations as husband and as wife; as by stipulating for the establishment of a community between the parties according to the custom of Paris.
3. A. and B. being about to marry, entered into a marriage contract, dated August 5th, 1777, containing clauses of which the following is a translation: "The said future spouses to be one and common in all moveable property and immoveable *conquests* (en tous biens meubles, et conquests immeubles), according to the ancient custom established in this colony, to which they submit themselves by force of the present contract;" "the said future spouses take each other with the property and rights to them now belonging, and such as may happen to come and belong to them hereafter, whether by succession, gift, legacy or otherwise; which property, from whichever side it may come to them, shall enter wholly into community without any reserve." *Held*, that these clauses were ineffectual to

NOTE.—The importance of this cause, both as regards the amount of value involved, and also the principles established by the decision of the court, is such, that the Reporter has considered himself justified in giving an extended report of the views presented to the court by counsel. The brief of Mr. R. M. Field, filed by him on a motion for a re-hearing, will, it is thought, be of interest to the profession, and it is accordingly printed at large.—[REPORTER.]

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- bring a lot of one by forty arpens of land in the St. Louis prairie, owned by the husband at the time of the marriage, into a conjugal community, in any such sense, that, on the death of the husband, the wife would be entitled to one half thereof.
4. By the Spanish law of succession, which prevailed here prior to September 1st, 1807, brothers of the half-blood would, in the case of an intestacy, be preferred in the succession to paternal aunts, and that, too, although the intestate acquired the property from his father. The Spanish law paid no regard to the quantity of the blood of the intestate in the veins of one claiming to succeed to an estate, except in the case of brothers and sisters of the whole blood and their descendants, who took before, and to the exclusion of, the brothers and sisters of the half-blood; nor did it pay any regard to the line from which the property came, except in the single instance of a deceased brother, leaving both paternal and maternal goods, and half-brothers and sisters on both sides.
 5. By the Spanish law of second marriages, a widow, having become such when over the age of twenty-five years, on her second marriage forfeited to the children of the first marriage all the property that she may have acquired from her deceased husband, by a lucrative title, either immediately, or mediately through an intestate succession to a deceased child of the first marriage. Immediately upon the second marriage the title to the property vested in the children, she, however, retaining the usufruct during her life.
 6. The 12th section of the territorial act of July 4th, 1807, provided that, "There shall be no distinction in the distribution of any intestate's estate between kindred of the whole or half-blood, unless when the inheritance came to the person so seized, by descent, devise or gift of some one of his or her ancestors; in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance." *Held*, 1st, that the words "of the blood" exclude only those who have none of the blood of the ancestor from whom the estate came, without reference to proportion or quantity; 2d, that all such as have none of the blood are entirely excluded; as where an estate came direct to the intestate from his father, brothers of the half-blood on the one side of the mother being in that case entirely excluded from the inheritance; 3d, that this exclusion is limited to an exclusion of those who are not of the blood of the immediately antecedent ancestor; as where an estate has passed by descent to two brothers, and upon the death of one brother his half has passed to the other, the intestate, the half-brothers of such intestate on the side of the mother are not excluded from inheriting that portion of the estate that came to the intestate from his deceased brother.
 7. Where A. conveys to B. contiguous lots, by separate granting words, descriptions, and habendums, and B. builds a house upon one of the lots, and makes an enclosure about the same, and accidentally, through mistake or ignorance of the boundaries, and without any design of taking possession of it, extends the enclosure over upon the other lot, so as to embrace a small

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portion of said lot; *held*, that this is not a possession within the meaning of our statute of limitations; although the actual detention—" *pedis possessio*"—exists; there is wanting the intention on the part of the possessor, which is necessary to constitute a civil possession.

8. *Quere*—Whether one who has taken possession of a small portion of a large lot or tract of land, under a deed, not of the lot, but merely of whatever interest the grantor may be found to have in it, has, without any thing more, a possession extending over the whole lot, within the meaning of our statute of limitations.

Appeal from St. Louis Circuit Court.

This was an action of ejectment commenced in the St. Louis Circuit Court on the 8th day of August, 1846, by Cutter, the respondent, to recover of Waddingham, appellant, who was tenant under the heirs of John Mullanphy, deceased, a tract of land described in the declaration as follows: "The following described lot or parcel of ground, situated at a place called the Prairie, near St. Louis, or Prairie La Grange de Terre, in said county, being a lot of one arpent, French measure, in width, by forty arpens, like measure, in length, and the same tract in said prairie which was originally granted to one Louis Lirette, and by the said Lirette sold to one John Baptiste Vivvarenne, deceased, being survey numbered 1479, as appears by the records of the office of the surveyor general of Missouri and Illinois."

The heirs of said Mullanphy were made co-defendants with their tenant, Waddingham, and the cause was tried under the common issue, January 4th, 1854. The jury found a verdict for the plaintiff for three hundred and thirteen undivided four hundred and twentieth parts of the land in controversy.

To maintain the issues on his part produced,

1. A concession made by St. Ange and Labuxiere to Louis Lirette, dated July 17th, 1769, and contained in livre terrain No. 1, p. 27. This concession was for "a tract of land situated in the prairie opposite the 'Grange de Terre,' [in the original, "*vis à vis la bute de la grange*,"] containing one arpent in width by forty arpens in depth, bounded on one side by the land of widow Marechal, and on the other by that of Condé."

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2. A survey by Duralde, the Spanish surveyor, taken from livre terrain No. 2, of one by forty arpens, for Louis Lirette, in the prairie adjoining St. Louis. By this survey, which was made between the fall of 1770 and the spring of 1772, the tract surveyed for Lirette was bounded on the one side by the "domain of the king, of $5\frac{1}{2}$ arpens in width," and on the other by Moreau. Duralde's surveys for Moreau and Vien, for the two lots of one by forty arpens each, lying north of Lirette, were also read in evidence. There was also put in evidence a connected plat of Duralde's surveys of the lots in St. Louis common field, a portion of which, representing the locations, as surveyed by Duralde, of the Vien, Moreau and Lirette arpens, the vacant $5\frac{1}{2}$ arpens, as also the two by forty arpens of Condé, is correctly represented as follows :

Vien.....	1
Moreau.....	1
Lirette.....	1
Vacante	$5\frac{1}{2}$
Augte. Conde.....	2

There was no proof offered as to the location of widow Marechal's land.

3. An act of sale executed before lieutenant governor Pier-nas, August 20th, 1774, by Louis Lirette, by which he conveyed to J. B. Vifvarenne a tract of land described as follows : "One arpent in width and forty arpens in length, situated opposite the foot of the mound, [vis à vis la bute de la grange,] or thereabouts, and joining on one side to the widow Marechal, and on the other side to the domain of the king, or land of Señor Condé; having been granted to him under the French government by Messrs. the commander and judge of this province, according to the grant which the said Lirette has this day given up to said Vifvarenne."

4. The tabular statement of recorder Bates recommending to

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congress for confirmation the claim of Lirette's representatives to the tract of one by forty arpens, surveyed for said Lirette by Duralde as above set forth :

Warrant or order of survey.	Survey.	Notice to the Recor. by whom.	Quantity claimed.	Where situated.	Poss. inhab. or cultivated.	Opinion of the Recorder.
Prov. Land Book, No. 2, p. 29.	Not platted.	Lirette's representatives.	F 167, 1 by 40 arpens.	St. Louis, out lot.	Poss. cultivated prior to 1803.	Confirmed 40 arpens, to be surveyed.

5. United States survey No. 1479, for Lirette's representatives. This survey was made in 1826, and embraces the land in controversy in the present suit. The description or heading attached to this survey by the deputy surveyor, is as follows :

" Plat and description of the survey of a tract of thirty-four and three-hundredths of an acre, executed by Rene Paul on the 19th October, 1826, under instructions from W. McRae, S. G., it being the tract of 1 by 40 arpens granted to Louis Lirette, 17th July, 1769, by the Spanish authorities of the province of Upper Louisiana, surveyed in the year 1770, 1771 or 1772, by Martin Duralde, in virtue of the power vested in him by the said Spanish authorities, (see livre terrain, No. 1, p. 27, and No. 2, p. 29, in the office of the recorder of land titles,) and confirmed to Lirette's representatives by the act of congress of 29th April, 1816."

6. Recorder Hunt's minutes of testimony, taken in 1825, under the act of May 26, 1824, to ascertain the several lots confirmed to individuals by the act of June 13th, 1812. The depositions of Baptiste Riviere and Rene Dodier, contained in said minutes, were read by plaintiff, showing that Lirette cultivated the lot now in controversy, and that Vifvarenne cultivated a lot of two by forty arpens next north of Condé, and three and a half arpens south of the Lirette arpent. Riviere, in his deposition, says : " This deponent says, of his own knowledge, the persons above named owned the field lots, as above described, and cultivated each of their field lots forty

years ago and upwards, and they continued under cultivation for many years."

7. Plaintiffs read in evidence a deed, dated October 13th, 1819, from Pierre Chouteau and wife to John Mullanphy, and, in connection therewith, showed by John O'Fallon, executor of Mullanphy, that the heirs of said Mullanphy claimed the land in dispute in this suit under that deed as a title paper. This deed embraces the Vien, Moreau and Lirette arpens. The operative words and descriptions in said deed are as follows: "have sold, granted, transferred and released, as by these presents we sell, grant, transfer and release to the said Mr. John Mullanphy, a certain piece of ground, lying and situate to the north of the town of St. Louis, at the place commonly called *the barn of earth*, (the Big Mound,) having two arpens in front by forty arpens in depth, or eighty arpens in surface, bounded on the north by a tract of land belonging to the said John Mullanphy, and on the south by a tract of land formerly granted by the Spanish government to Mr. Louis Lirette, sold by the said Lirette to Mr. Vifarenne, and by the heirs of said Vifarenne to us, the above named vendors; which said two arpens belong to us, who acquired them as follows, to-wit: one arpent from the heirs of Mr. François Moreau, and the other arpent from Mr. J. B'te Vien, as it is witnessed by a deed of sale recorded in the office of the clerk of the county of St. Louis, book F, p. 385, together with all the rights, privileges and appurtenances which belong or may belong to the two arpens by forty above described and sold; warranting them free from all gifts, debts, dower, mortgages, and all other encumbrances generally whatsoever: to have and possess the said eighty arpens to the said John Mullanphy, his heirs or assigns, in full and entire property, and as a thing by him lawfully acquired. Further, for and in virtue of the consideration aforesaid, we, the aforesaid Peter Chouteau and Brigette Saucie, his wife, sell, grant and transfer to the said Mr. John Mullanphy, all the rights, titles, claim, interest and estate which we have or may have to a certain piece of land

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having one arpent by forty in depth, and touching to the north the piece of land above herein described and sold; which last piece of land was originally granted to Mr. Louis Lirette, transferred by him to Mr. Vifarenne, and which we have acquired from the heirs of the said Vifarenne, — to have and possess the said forty arpens in surface to the said Mr. John Mullanphy, his heirs or assigns, as we might do ourselves in virtue of the deed of sale which has been delivered to us therefor; warranting it, as towards and against ourselves, heirs, administrators or executors, to be free from all debts, dower, or mortgages, but without any other guaranty whatever.”

8. In proof of a derivative title from Jean B^{pte} Vifvarenne, plaintiff, proved from the parish records, that on the 6th of August, 1777, the said Vifvarenne intermarried with Genevieve Cardinal; that there were three children born of this marriage; Jean B., baptized May 3d, 1779; Louis, baptized August 15th, 1780, and François, baptized April 9th, 1782. The parish records show the burial, on the 1st of January, 1781, of an infant of Vifvarenne, aged fourteen months, as stated in the certificate. This must have been the first-born. J. B. Vifvarenne, the elder, died leaving his wife, Genevieve, surviving. The precise time of his death did not appear. The evidence introduced by both parties fixes the date of his death in the early part of the year 1782. Of François, the youngest, no definite account was given. Plaintiff introduced several witnesses who knew Louis Vifvarenne in his boyhood, as also his father and mother. They agreed in saying that they never knew or heard of his having any brothers of the whole blood. One of plaintiff's witnesses, however, intimated that there was another child besides Louis, who died in infancy. Evidence introduced by the defendants, (an official inventory, taken August 19, 1782, purporting to be an inventory of the effects of the widow of Vifvarenne and her *two* children,) tended to prove that François survived his father. After the death of Vifvarenne, his widow (Genevieve) married Jacques Marechal, and had by him three sons—Charles, Toussaint, and Joseph. Gene-

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vieve died in 1792, and was buried, as appears from the burial certificate, on the 2d of November, 1792.

Plaintiff read in evidence depositions of old French residents of St. Louis and of St. Charles, in this state, (to which latter place the widow of Vifvarenne removed after the death of her first husband, who were acquainted with Louis Vifvarenne. From these it appeared that Louis left St. Louis about the year 1800, and went to the lower country; that he went to Opelousas, in Louisiana; that he never returned to Missouri afterwards; that there came a rumor of his death at that place. A large number of depositions, taken at Opelousas, were given in evidence, tending to prove that a person answering the description of Louis Vifvarenne, came to the parish of St. Landry, Louisiana, and took up his residence near Opelousas, in that parish; that he was commonly known there by the name of Louis Cardinal; that this Louis Cardinal was identical with Louis Vifvarenne, the son of J. B. Vifvarenne, of St. Louis; that the said Louis died near Opelousas, in the year 1813. Louis Vifvarenne was never married. Defendants read in evidence certain depositions, tending to prove that the person called Louis Cardinal, spoken of by plaintiff's witnesses, who died at Opelousas in 1813, was a different person from Louis Vifvarenne, the son of J. B. Vifvarenne. There was also some slight evidence tending to prove that Louis Vifvarenne died before September 1st, 1807, when the territorial act regulating descents went into effect.

J. B. Vifvarenne had two sisters, who survived him: Catherine, wife of Joseph Labuxiere, and Felicité, wife of Antoine Sans Souci.

Plaintiff claims that upon the death of Louis Vifvarenne, in 1813, without issue, the land in controversy passed to the descendants of the said Catherine Labuxiere and the said Felicité Sans Souci, to the exclusion of the brothers of the said Louis of the half-blood.

9. Plaintiff gave in evidence sundry deeds from certain persons, the descendants and heirs of Catherine Labuxiere and

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Felicité Sans Souci. These conveyances gave, under the instructions of the court, as the plaintiff insisted, $\frac{313}{420}$ parts of whatever interest in the premises in dispute descended from Louis Vifvarenne to the representatives of his paternal aunts, Madame Labuxiere and Mad. Sans Souci.

10. The defendants, relying on the statute of limitations as a bar to plaintiff, introduced evidence under that issue, tending to prove that, in the year 1820, Mullanphy built a house on the east end of the Moreau arpent, and made a small enclosure of several arpens around it; that the south line of this enclosure ran into the Lirette arpent, and at the south-west corner of said enclosure, a small portion of the said arpent was enclosed; that in the year 1826 Waddingham removed the west fence so as to take in several additional arpens; that the south line of the enclosure did not follow the direction of the lines of the 40 arpent lots, but ran west at right angles to Broadway street; that the south fence remained in the same position until the year 1833, when it was removed further south; that in 1832, prior to this removal of the fence, Mullanphy declared to one Smith Robinson, who had applied for a lease of the ground south of the enclosure, that "he did not own any thing south of the enclosure."

The witnesses introduced by both parties were not agreed as to the extent of this enclosure on the south. Some of them thought that it extended across a considerable portion of the Lirette arpent. In 1839, the whole of the Lirette arpent was fenced in. The deed set forth above from P. Chouteau and wife to J. Mullanphy was recorded November 1st, 1819.

The defendants, to maintain the issues on their part, in addition to the evidence set forth above, introduced in evidence the following:

1. An extract from the connected plat of the St. Louis common fields from the office of the surveyor general, showing the position of lots as surveyed by the United States, from Cousat on the south, to Vien on the north, as follows:

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No. 1481.	Vien's Reps.	1 by 40 arps.
No. 1480.	Moreau's Reps.	1 by 40 arps.
No. 1479.	Lirette's Reps.	1 by 40 arps.
No. 734.	Jno. Mullanphy under Jno. Bte. Provenchere..	2 by 40 arps.
No. 3301.	Amable Guion's leg. Rep.	1 by 40 arps.
No. 3003.	(of general series) School Land69.85 acres.
No. 1478.	Auguste Conde's leg. Reps.	1 by 40 arps.
No. 1438.	Pierre Chouteau under Cousat.....	2 by 40 arps.

2. The marriage contract executed August 5th, 1777, between J. B. Vivfarenne and Genevieve Cardinal. This contract was in the French language, and was entered into before Francis Cruzat, lieutenant governor of the province. It stipulates for a conventual community by the following clauses :

—pour etre les dits futurs epoux uns et communs en tous biens meubles, et conquets immeubles, suivant et au desir de l'ancienne coutume etablie en cette colonie, a laquelle ils se soumettent pour raison du present contrat.

Les dits futurs epoux se prennent avec leurs biens et droits a eux appartenans actuellement, et ceux qui pourront leur avenir echoir et appartenir par la suite, tant par successions, donations, legs, ou autrement, LESQUELS BIENS, de quelque cote qu'ils puissent leur venir, entreront pour le tout en communante sans auneune reserve.

—the said future spouses to be one and common in all moveable property, and immoveable conquests, according to the ancient custom established in this colony, to which they submit themselves by the force of the present contract.

The said future spouses take each other with the property and rights to them now belonging, and such as may happen to come and belong to them hereafter, whether by succession, gift, legacy or otherwise, which property from whatever side it may come to them, shall enter wholly into community without any reserve.

In another clause of the contract, the husband endows the wife with the sum of 600 livres *douaire prefix*, which were to be taken, as soon as dower attached, from the present or future property, moveable or immoveable, of the husband ; and for such dower the said property was hypothecated with special privilege (*par privilege affectes et hypotheques.*)

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The contract gives to the survivor the right to take, by *preciput*, 400 livres out of the community property. It also allows the wife to renounce the community and take back all she has brought in, together with her *douaire* and *preciput*, for the payment of which all the husband's property is hypothecated.

3. The official inventory of the effects of the widow Genevieve Vifvarenne and her two children, taken August 19th, 1782, under the direction of Cruzat, the lieut. governor, and signed by him; also the process verbal of the public sale of the same. In this inventory no mention is made of the forty arpent lot in controversy, or of any tract of land. Sans Souci, the brother-in-law of Vifvarenne, was a subscribing witness to the inventory.

4. A deed dated October 11, 1817, recorded December 11, 1819, from Toussaint and Charles Marechal to Pierre Chouteau. This deed purported to be executed by the said Toussaint and Charles as "heirs at law of the late Jacques Marechal and of Madame Vifvarenne, his wife," and to convey to the said Chouteau "a certain piece of land lying and being situate near St. Louis, in the Little prairie, near the barn lot (La Grange de Terre), as well as all the rights, titles and claims which we have in and to the said piece of land as heirs of Madame Vifvarenne, and also those which we may have. The said piece of land now sold by us having one arpent in front by forty arpens deep, and bounded on the south by vacant lands, and on the north by lands of Moreau."

5. Defendants read in evidence the testimony of one Antoine Smith, given on the former trial, (in 1849) as follows: "That he knows where the Vifvarenne arpent or field lot is; it is bounded north by Moreau, and south by Provenchere; it is south of the Big Mound, on Broadway.

"Being cross-examined, said Smith stated that the said Vifvarenne field-lot he knows by having seen Lirette work upon it; when he (witness) came to this country, which was sixty years ago from the 25th of last August, said Lirette cultivated that common field lot, but left a year or two afterwards

and went to Florissant; that Lirette claimed said lot, and, as witness supposed, cultivated it for himself. This field lot is seven or eight arpens from the Big Mound, and is the sixth arpent north from Mrs. Biddle's; that no one else cultivated said Lirette arpent, to his knowledge; that he (witness) passed along there two or three weeks ago; the person who cultivated was Louis Lirette, who died some twenty-four or twenty-six years ago; he left children, but whether they are dead or alive he can not tell; that said Louis Vifvarenne worked on two arpens that came from his father, lying next north of Madame Biddle and next to Condé, on the north of and adjoining Condé; Louis cultivated there one year alone; that he came to St. Louis in the spring to raise a crop of corn; the two arpens aforesaid, on which he worked, were three arpens distant from and to the south of the said Lirette arpent; that the two arpens so worked by Louis came, as he said, from his father."

Defendants also introduced evidence showing that the lot confirmed to Lirette is situate between the two most conspicuous mounds east of the common fields; that it does not lie opposite the foot of either mound; that its eastern end is four arpens south of the northern mound, and five and a quarter arpens north of the southern mound; that the lot next north of Condé touches at its eastern end the conspicuous mound now known as the Reservoir mound.

6. A letter directed to the commissioner of the general land office, dated January 15, 1846, and signed by Martin Thomas, Norman Cutter (the plaintiff) and others. In this letter, title is claimed under Louis Vifvarenne to the tract of two by forty arpens next north of Condé, and it is based upon a confirmation by the act of June 13, 1812.

Defendants offered in evidence a letter of Martin Thomas to the board of president and directors of the St. Louis public schools, dated April 2d, 1839. In this letter, Thomas asserted title to the lot next north of Condé, under the act of sale of 1774 from Lirette to Vifvarenne. This act of sale was recorded in 1839, and then delivered by the recorder to Martin Thomas,

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as appears from the recorder's certificate. This letter was excluded on the objection of plaintiff, and defendants excepted. The defendants also offered to prove that prior to the commencement of this suit, the plaintiff, and others in privity with him, entered into possession of the lot in the common fields, situate north of Condé, claiming the same under the heirs of J. B. Vifvarenne; that they asserted title thereto under the deed from Lirette to Vifvarenne, dated in 1774, and read in evidence on this trial; that they successfully maintained their title to said land, and do at the present time hold one by forty arpens of said land, or the avails thereof. The assertion of title above spoken of, was against adversary claimants other than the present defendants. The court, on the objection of the plaintiff, excluded the said testimony, and to said exclusion the said defendants then and there excepted.

7. The defendants then offered a deposition of Rene Paul, purporting to have been taken before A. Wetmore and Duportal D. Davis, two justices of the peace, in August, 1844, and filed on the 15th day of April, 1845, in a case wherein Hempstead was plaintiff and Martin Thomas defendant [taken and filed by Martin Thomas]. In this deposition Paul declares that the true location of the lot described in the act of sale of 1774, from Lirette to Vifvarenne, is next north of Condé. This deposition was excluded on the objection of plaintiff. Defendants excepted.

The court, on motion of the plaintiff, gave the following instructions to the jury:

Plaintiff's Instructions Given.

1. If the jury believe from the evidence that John Baptiste Vifvarenne left more than one child surviving him, and that either of said children died before his or her mother, and after his father, and that Genevieve Cardinal was married a second time to Jacques Mareschal, on or about the — day of —, 1784, such second marriage had the effect of depriving the said

Genevieve of any estate of inheritance derived from said child, and at the death of said Genevieve, if there was a surviving child of said John Baptiste Vifvarenne, said child took the entire estate. Such is the general rule, and if it is claimed by the defendants that John Baptiste Vifvarenne died before his wife attained the age of twenty-five years, and that therefore she should take from any deceased child or children of the first marriage, the jury are instructed that this is an exception to the general rule, and it is for the defendants to prove the facts upon which the exception is founded; and in the absence of any proof satisfactory to the jury, on this point, they will disregard the exception and find according to the general rule.

2. If the jury believe from the evidence that John Baptiste Vifvarenne was seized of the premises in question before his marriage with Genevieve Cardinal, and that he died before his said wife, then, upon his death, the estate descended to his heirs; and if the jury believe Louis Vifvarenne was his only surviving child, and that he died in 1813 or about that time, unmarried and not having had any legitimate children, then the premises went to his paternal kindred; and if the jury believe that the wife of Joseph Labuxiere, the elder, and the wife of Sans Souci were aunts of said Louis, and his nearest kindred on his father's side, they or their heirs took the estate in exclusion of any brothers of the half-blood, on the mother's side; and if the jury believe that Pierre Pollardie, Noel Pollardie, Antoine Pollardie, Michael Pollardie, Bazile Pollardie, Marie Pollardie, Celeste Tabeau, Elizabeth Denise Lamache, Marie Lamache and Jno. Baptiste Dorlack; and that Andre Beauchmin, Joseph Beauchmin, Mary Janis and Margrette Beauchmin; and that Joseph Labuxiere, jr., Eugene Labuxiere, Henry Labuxiere, Marcilete Letamps and her husband, Odile Letamps and her husband, and Marie Louise St. Amand and Louis Burtis were descendants and next of kin of Joseph Labuxiere, the elder, and his wife the sister of John B. Vifvarenne; and if the jury believe from the evidence that Felicite Marly, Victoire Marley, Luke Marley and John Baptiste Marley were descen-

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dants and next of kin of Sans Souci and his wife, the sister of John B. Vifvarenne; and that the deeds given in evidence from these persons were duly executed by them and the husbands of said Marcelite and Odile Letamps, and of Mary Janis, to the plaintiff in this suit, the jury will find for the plaintiff such portion of the premises of which defendants were in possession at the commencement of this suit, as the above persons would be entitled to as lineal descendants of said Labuxiere and said San Souci and their wives. If the jury believe that Charles Beauchmin has been absent from the state more than seven years, and no tidings have been had of him, his death will be presumed, and his share go to his brothers and sisters; and if they believe Louis Beauchmin dead intestate, and without children, his share went to his wife and brothers and sisters; and if François Labuxiere is dead, his share went to his mother and brother and sisters.

3. The official survey of the United States, No. 1479, introduced on trial by plaintiff, is *prima facie* evidence of the true location of the one by forty arpens of land conceded to Louis Lirette on the 17th July, 1769, and confirmed by the act of congress of 9th April, 1816, to Lirette's representatives.

4. The certificate of burial from the parish of St. Landry, Opelousas, in Louisiana, is not to be received by the jury as evidence upon the question of legitimacy or illegitimacy of Louis Vifvarenne.

5. To enable the defendants to avail themselves of the statute of limitations, it must affirmatively appear to the jury by proof that their possession of the land in controversy, or the possession of those under whom they claim or of a part thereof, must have been held adversely to all others, by claiming the land under a deed purporting to convey the legal title, and that such possession and claim of the land must have commenced and continued without interruption or omission for twenty years before the commencement of this suit, claiming the same. If, therefore, the jury shall believe from the testimony that defendant, or those under whom they claim, had not such a posses-

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sion of the land sued for, as commenced and continued, claiming the same as aforesaid, without interruption, for twenty years before the commencement of this suit, they will find for the plaintiff on the defence raised under the statute of limitations.

7. The jury are instructed that, if they believe from the evidence, that Joseph Labuxiere the elder, and his wife, the sister of John B. Vifvarenne, died before Louis Vifvarenne, then the deed of Joseph Beauchmin to François Labuxiere, dated August 2, 1830, and the deed of N. Janis, Andre Beauchmin and Marie Janis, to François Labuxiere, dated 2d August, 1830, and the deed of Louis Labuxiere to François Labuxiere, dated 28th July, 1830, and the deeds of François Labuxiere to John Steele, dated 3d August, 1830, and 9th September, 1830—all of which were introduced on this trial by defendants—conveyed no interest whatever in the land in controversy, and need not be noticed by the jury in their deliberations.

8. On the second marriage of Genevieve Cardinal with Jacques Mareschal, she became disabled from transmitting by descent to her heirs any property which she had acquired by gift, donation, legacy, *or in any other manner*, from John B. Vifvarenne, if he was her first husband; and if he died, leaving children surviving him, and any child or children of said John B. Vifvarenne survived said Genevieve Cardinal, provided said Genevieve was of age, i. e., twenty-five years old at the death of her first husband. To the giving of said instructions, and each of them, defendants then and there excepted.

Defendants' Instructions Given.

On motion of the defendants, the court gave the following instructions to the jury :

1. Unless the jury are satisfied that the lot conceded to Lirette in 1769, and by him sold to J. B. Vifvarenne in 1774, is the same lot, part of which is sought to be recovered in the present suit, the plaintiff is not entitled to recover.

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2. The inventory read in evidence of Genevieve, is evidence tending to prove that at its date there were two sons of Bte. Vifvarenne and Genevieve then living.

3. If the jury find that J. B. Vifvarenne left two sons at his decease, the burthen of proof is on the plaintiff to show by evidence the fact of the death of said sons, and the time when such deaths occurred.

4. If the jury find from the evidence that the marginal notes to the copies from livre terrain No. 2, offered by plaintiff, were not part of the original record, but were placed there without competent authority, such marginal notes are not evidence of any thing.

Defendants' Instructions Refused.

The defendants moved the court to give the following instructions to the jury :

5. If the jury find that Lirette was the person last in possession of the lot in question prior to the 20th December, 1803, and that he cultivated the same as his own, subsequently to the death of J. B. Vifvarenne, then the representatives of Vifvarenne are not entitled to the benefit of the confirmation, and the plaintiff can not recover.

6. The testimony of Reviere and Dodier before the recorder in 1825, read by the plaintiff, is evidence that Lirette was the last person who cultivated the lot in question prior to 20th December, 1803.

7. Even if J. B. Vifvarenne was once owner of the lot in question, still if he parted with his title to the same before his death by sale, abandonment or forfeiture, then the plaintiff is not able to recover.

8. Under the Spanish law which prevailed here until the 24th day of March, 1804, land might be transferred without writing or abandoned by the owner, and a lot in the common fields might be forfeited by the owner by non-compliance with the public regulations.

9. If the paper purporting to be an inventory of the property of Genevieve Vifvarenne and her two children is genuine and does not contain the lot in question, it is evidence that J. B. Vifvarenne was not the owner of the lot in question at the time of his death, if the jury find that the said J. B. Vifvarenne and Genevieve made the marriage contract read in evidence.

10. If J. B. Vifvarenne, being the owner of the lot in question, made the marriage contract read in evidence with Genevieve Cardinal, and subsequently intermarried with her, and died leaving her surviving; and the defendants are now in fact holding said lot by purchase under children of said Genevieve, then the plaintiff can not recover in this action.

11. If J. B. Vifvarenne, while owner of the lot in question, and Genevieve Cardinal made the marriage contract read in evidence and subsequently intermarried, and J. B. Vifvarenne died insolvent, having no property to satisfy the rights and claims of said Genevieve under said contract except the lot in question, and the defendants are now holding said lot under sons of said Genevieve, then the plaintiffs are not entitled to recover.

12. If the jury find that the marriage contract between J. B. Vifvarenne and Genevieve, his wife, is genuine; that J. B. Vifvarenne died leaving two sons issue of that marriage, and that Genevieve died leaving *three* sons by a second husband, then, under the evidence of the plaintiff, Louis, one of the sons of said J. B. was entitled, at his death, to no more than seven-sixteenths of the lot in question.

13. If the jury believe that J. B. Vifvarenne and Genevieve Cardinal made the contract read in evidence, and intermarried, and afterward J. B. died leaving Genevieve surviving, then, by force of the contract, said Genevieve, on a settlement of the community, would be entitled to one half of the real property owned by said J. B. at the time of the marriage.

14. If the jury find that J. B. Vifvarenne and Genevieve Cardinal made the marriage contract read in evidence, and subsequently intermarried, then, on the dissolution of the marriage

by death of J. B., while said Genevieve was under the age of twenty-five, she would be entitled to take and hold the amount of 600 livres for dower out of the community property, and, in default of such community property, out of the separate property of said J. B. Vifvarenne.

15. Unless the jury believe that Louis Vifvarenne, the son of J. Bte. Vifvarenne, is identical with Louis Cardinal, mentioned in the depositions from Opelousas, there is no evidence that said Louis died after September 1, 1807.

16. If Louis Vifvarenne died before September 1, 1807, having brothers of the half-blood who have conveyed the lot in question, the plaintiff can not recover.

17. So much of the estate of Louis Vifvarenne, in the lot in question, as came to him prior to September 1, 1807, passed upon his death to brothers of the half-blood, in preference to uncles and aunts, if he died after September 1, 1807.

18. If Louis Vifvarenne, died after September 1, 1807, leaving brothers of the half-blood, such brothers would inherit, to the exclusion of the aunts of Louis Vifvarenne and their descendants.

19. So much of the estate of Louis Vifvarenne, in the lot in question, as came to him by descent from his mother or brother, passed by descent at his death, after September 1, 1807, to brothers of the half-blood, in preference to uncles or aunts, although such estate might have originally come to the mother or brother from his father.

20. The legal presumptions arising in the inventory introduced in evidence by defendants, if genuine, are, 1st, that the property mentioned in the inventory was, at the time it was made, the property of Jean Baptiste Vifvarenne, deceased; 2d, that the inventory contained all the property of the deceased; 3d, that these presumptions throw the burthen of proof on the party who denies their correctness; 4th, that, to prove that any property not mentioned in the inventory was, at the time it was made, the property of the deceased, it is not suffi-

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cient to show that the deceased *once owned the property*—the proof must show that he owned it *at the time of his decease*.

21. The statement of the parentage of Louis Vifvarenne, *alias* Cardinal, in the burial certificate from Opelousas, is evidence of the parentage therein stated, if the jury believe the record of said burial to be genuine.

22. The recital in the deed of Chouteau and wife to Mullanphy, to the effect that the lot conveyed was conceded to Lirette, and by him transferred to Vifvarenne, are no evidence in the present action of the truth of the matters thus recited.

23. If the jury find that Charles and Toussaint Mareschal conveyed the lot in question to Chouteau in 1817, by their deed read in evidence ; and that said Chouteau, by his deed of 1819, read in evidence by the plaintiff, conveyed the same lot to John Mullanphy ; and that said Mullanphy, during his lifetime, and his heirs since his decease, have always claimed title to said land under said deed of Chouteau, and have exercised acts of ownership over the same by leasing or fencing the same, or parts thereof, from time to time, and that no claim was made to said premises by or under the heirs of J. B. or Louis Vifvarenne, until 1845,—then, in favor of such old title, the jury may presume an adjudication of said lot to Genevieve Vifvarenne, or a conveyance of the same lot to said Chouteau by the heirs of said Vifvarenne.

24. The said deed from Chouteau and wife to John Mullanphy, read in evidence by the plaintiff, is evidence for the defendants that the said John Mullanphy claimed a connected tract of land in the St. Louis common fields, having a front of three arpens and a depth of forty arpens : the northernmost arpent being the arpent originally granted to Vien, and the southernmost arpent being that originally granted to Lirette.

25. Possession of part of a tract of land by a party claiming the whole tract by a recorded deed, or by his tenant, is constructive possession of the whole tract, provided there be no adverse possession of such tract by any other person.

26. If the jury believe from the evidence that the ancestor

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of the defendants, in his lifetime, and the defendants, since his death, by their respective tenants, have had uninterrupted possession of part of the above described premises or connected tract of land (the defendants and their ancestor claiming the same as their own, and having a recorded deed therefor), for the period of twenty years and upwards before the commencement of this suit, such possession is a bar to the maintenance of this action by the plaintiff as to any part of said tract of three by forty arpens; and the jury will find for the defendants, provided no one except said defendants and their tenants has had possession of any part of said tract of three by forty arpens within said period of twenty years.

27. It is not requisite that the jury, in order to find as indicated in the third instruction, should believe the part actually in possession of defendants to have been a portion of the arpent originally granted to Lirette, provided it were a part of the connected tract of three by forty arpens, conveyed by the said deed from Chouteau and wife to Mullanphy.

The court refused to give the last mentioned instructions, or any of them, and to such refusal the defendants then and there duly excepted. The court then, on defendants' motion, gave the following instructions to the jury:

28. If the jury believe from the evidence that John Mullanphy, in 1819, received from Pierre Chouteau the deed read in evidence by the plaintiff, and took possession in the following year of part of the land thereby conveyed, including part of the Lirette arpent within his enclosure, claiming the whole tract of three by forty arpens, by virtue of said deed, and by himself and his heirs continued so in possession for the space of twenty years before the commencement of this suit, there being no actual possession of the tract during that time except on the part of the said Mullanphy and his heirs, then such possession is a defence and a title to the said John Mullanphy and his heirs, as to the whole one by forty arpens confirmed to Lirette, against all persons not within the exception of the statute of

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limitations ; and it is the duty of the plaintiff to show himself within such exception.

29. The jury is further instructed that possession by the tenant of Mullanphy and his heirs, is equivalent in law, for the purposes of the foregoing instruction (No. 28), to the possession of said John Mullanphy or his heirs.

30. The baptismal certificate of Genevieve Cardinal is no evidence, in the present case, that she was of the age stated in such certificate at the time of her baptism.

The counsel, after the giving of the instructions to the jury, proceeded to address the jury ; and after three days spent in argument, and when said argument was concluded, the court announced to the counsel that the instructions given by the court on the subject of the statute of limitations were, in the opinion of the court, repugnant and contradictory. Therefore the court withdrew from the jury the forementioned instructions given on defendants' motion, marked 28 and 29, and in lieu thereof gave to the jury the following instructions :

6. If John Mullanphy, in 1819, received from Pierre Chouteau the deed read in evidence by the plaintiff, and took possession in the following year of part of the land thereby conveyed, including part of the Lirette arpent within his enclosure, claiming the whole of three by forty arpens under the said deed, such possession of part of the Lirette tract, if continued uninterruptedly for the space of twenty years before suit, is a good defence under the statute of limitations, as to the whole tract, provided it shall be made to appear from the evidence that the claim to the portion unenclosed was open and notorious, and accompanied by such acts of ownership over the same as to indicate an intention to assert the ownership and possession of the whole, as by leasing or using the same in a manner usual and customary with reference to the description of the land.

9. Should the jury find for the defendants, the court requests, for its convenience, that they should state specially how they find as to the defence of the statute of limitations.

The court then informed the counsel for the defendants that,

if they desired it, they might then proceed to argue the case to the jury upon the instructions as they then stood, which they declined to do. To the withdrawal of said instructions, numbered 28 and 29, and to the giving of said instructions last given, the defendants then and there duly excepted. The defendants then moved the court to give the following instruction to the jury :

31. If the jury shall believe from the evidence in the cause, that John Mullanphy, after purchasing by deed from Chouteau the Lirette arpent and the Moreau and Vien arpent, put up an enclosure with the intention of embracing the entire Lirette arpent on its south and east lines, but, from the uncertainty as to the actual location of said Lirette arpent, he ran his fence so as not to embrace the entire east and south lines of the said Lirette arpent ; yet, if they shall believe from the evidence that the fence, as run, embraced any part of the Lirette arpent, the possession of that part was possession of the whole, if there was at the time no adverse possession of the part not embraced by the enclosure.

The court refused to give said instruction, and to such refusal the defendants then and there duly excepted.

The jury retired from the bar on Friday morning, January 20, to consult upon their verdict. On the next day, the jury came back to the bar and were asked by the court if they had agreed upon a verdict. The foreman said : " We are not agreed, we want further instructions ; but I will state to the court that only some of the jury authorize me to make the request ; the others do not wish it." The court then remarked to them that, in that state of things, he was at a loss to perceive how he could render them any assistance. Nothing further falling from the jury, and after waiting upon them a suitable time, the court inquired of counsel on both sides, who were present in court, if they had any objection to its being ascertained how the jury stood numerically. No objection having been made on either side, and the court having cautioned the jury that he did not wish to know how they stood in reference

to the parties, but only how they were divided numerically, the foreman then answered: "There are eleven obstinate men among us." The court remarked that the extent of their division was different from what the observations of their foreman had led him to suppose, and added that the juror alluded to was at liberty to speak for himself, if he desired to do so. Thereupon said juror came forward and submitted to the court the following question, in writing, already prepared for the purpose before the jury came into court:

"If ten feet or more of any part of the Lirette arpent was enclosed by fence for the space of twenty years before this suit was brought, would that be considered possession under the statute of limitations for the whole tract in dispute?" Defendants' counsel here moved that the jury be discharged, upon the ground that they had disclosed and rendered public their deliberations, and were therefore disqualified to act longer in the cause. The court refused to discharge the jury, and defendants' counsel at the time excepted. The court gave the following answer:

"That fact alone, unless accompanied by such acts of ownership over the unenclosed portion of the tract of the character already indicated in instructions given, would not suffice to constitute a defence under the statute of limitations." The jury found a verdict for the plaintiff. A motion for a new trial was duly made, overruled, and exceptions saved.

R. M. Field, Hamilton R. Gamble, T. T. Gantt and J. R. Shepley, for appellant. Mr. Field submitted a lengthy printed brief, of which the following is an abstract:

The grounds of defence may be grouped under five general heads.

First. The lot granted to Lirette and by him conveyed to Vifvarenne, was a different lot from that confirmed to Lirette's representative; and was locally situate five and a quarter arpens farther south.

Second. If the lots were identically the same, still Lirette was the person last in possession prior to 1803, of the lot in

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controversy, claiming the same as his own, and the lot was confirmed to *him* by the first section of the acts of 13th June, 1812.

Third. The immovable property of J. B. Vifvarenne was carried into conjugal community by a marriage contract had between him and his wife, and any rights that the heirs of the husband might have in the property could not be asserted in an action of ejectment against those claiming under the heirs of the wife.

Fourth. Whatever estate J. B. Vifvarenne had in the lot in controversy, passed by force of the marriage contract and the Spanish law of succession, or the territorial law of descent, to the half-blood brothers of Louis Vifvarenne, under whom the defendants claimed.

Fifth. The plaintiff and those under whom he claimed, had lost all title to the land, by the statute of limitations and by the lapse of time.

First—As to Location.

1. The question of the true location of the lot granted to Lirrette in 1769, was unquestionably proper to be passed upon by the jury as a mere question of fact. The first instruction given for the defendants fairly left the matter to the jury; and if the court had stopped there, the defendants would have no just cause of complaint on this point. But the whole force of this instruction was destroyed by the third instruction given for the plaintiff. Now, there was no dispute about the location of the lot confirmed in 1816; it was admitted on all hands to embrace the land in dispute. The whole controversy turned on the question whether this lot was the same as that granted in 1769. The instruction tells the jury, as matter of law, that the lots were one and the same; and of course this ground of defence was wholly cut off. The error was gross and palpable.

The only apology for this error exists in the circumstance that the deputy surveyor, in the description attached to survey

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1479, goes out of his way to speak of the survey as being for the lot of ground to Lirette in 1769. But it is plain that the surveyor had no authority under the law to survey French grants as such. Those grants have been always held to be mere nullities. (*Wright v. Thomas*, 4 Mo. 577.) The statement, therefore, by the surveyor, that survey 1479 embraced the lot granted to Lirette in 1769, was an extra-official expression of his private opinion, which was entitled to no weight whatever in a court of justice.

The court below erred in its action upon the evidence bearing on this question of location. The plaintiff was permitted to read the deed of Chouteau to Mullanphy containing recitals to the effect that the land conveyed was conceded to Lirette and by him transferred to Vifvarenne. The object of the plaintiff clearly was to prove the location by the declaration of defendants' grantor. On the other hand, defendants were not permitted to prove that plaintiff had himself asserted and maintained title to a tract of one by forty arpens under the same title papers located elsewhere, to-wit, next north of Condé. See also defendants' instruction refused, No. 22. The decisions of the court are irreconcilable; both may be wrong—one certainly is.

Second—As to the Confirmation by Act of 1812.

1. The construction of the act of the 13th of June, 1812, has been settled by a series of decisions in this court, commencing with the case of *Lajoie v. Prim*, 3 Mo. 368, and coming down to *Soulard v. Clark*, 19 Mo. 570. The doctrine of these cases has been recently affirmed by the Supreme Court of the United States. (*Guitard v. Stoddard*, 16 How. 494.) The rule, as established by the cases, may be thus stated. The confirmation by the act of 1812 is not founded on any grants or title papers, but simply on the right, title or claim evidenced by the fact of inhabitation, cultivation or possession prior to 1803. Where there has been in succession a possession of the

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same lot by different persons, as was the case in *Lajoie v. Prim*, the person last in possession prior to 1803 is entitled to the benefit of the confirmation. It is not doubted that title papers may be produced for the purpose of showing who has succeeded to the right, title or claim attaching to the fact of possession; but this limitation of the rule has no application to the case before the court.

The testimony of Antoine Smith, the plaintiff's witness, was direct and explicit that Lirette was in possession of the lot in controversy, cultivating it as his own, sixteen years after the date of the conveyance to Vifvarenne, and full eight years after the death of Vifvarenne. There was not the slightest evidence to the contrary of this. Under this state of the case, the defendants moved instruction 5th, which was refused by the court. 2. Instructions 7 and 8, as to abandonment and parol transfer of land under the Spanish law, were improperly refused. They were pertinent to the case. (*Strother v. Lucas*, 12 Pet. 3.) Instructions Nos. 9 and 20 ought to have been given. They gave to the inventory no other effect than what it had by the Spanish law, when it was made: "The inventory is an instrument in which is set down the property met with upon a person's death, bankruptcy or other occasion, and was introduced as of common right for four reasons: 1. That the heirs might not conceal the hereditary property, especially the moveables. 2. That they might not be bound beyond the actual amount of the inheritance. 3. That as by means of it there could be no doubt about the amount of the inheritance, they could not ask delay to accept or renounce it. 4. *To make proof of any negative allegations which are judged incapable of proof in any other manner.*" (4 Febrero, 1.) Defendants alleged that the property in dispute was not the property of Vifvarenne, and the inventory was adduced as proof of this negative allegation. (See also 4 Febrero, 14, 105; Escriche, Dicc. de Legisl. y Jurisp. voc. Inventario.) Under the Spanish law the inventory taken by public authority was never treated as a mere *ex parte* proceeding, but partook of the character of a solemn

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judicial inquisition. The separate property of the spouses was always included in the inventory taken of the community property under the Spanish law. (See 5 Febrero ; Ferriere cout. de Paris, vol. 3, p. 586.) 4. Defendants' instruction 6 should have been given.

Third—The Marriage Contract.

The marriage contract creates a community between the parties "according to the ancient custom established in this colony." The custom here referred to can be no other than the Custom of Paris. That custom was the common law of the French colonies. (Petit, Gouvernement des Colonies, tome 2, p. 179, 146, 171, 177 ; 1 id. 71 ; Charter to Crozat, art. 7 ; 1 Bioren & Duane's Stat. U. S. 439.) This custom unquestionably subsisted here until the Spanish government took possession of the colony in 1769. It was never formally abrogated by the Spanish authority, so far as it concerned the private contracts of the inhabitants. O'Reilly's proclamation in 1769 did not have that effect. For Mr. Jefferson's opinion, to the effect that this proclamation only introduced the Spanish law in respect to judicial procedure, see 2 Duff Green's State Papers, public lands, p. 1. The Supreme Court of Louisiana has decided that the Spanish law was introduced into Lower Louisiana not by force of O'Reilly's proclamation, but by usage or popular adoption. (Beard v. Poydras, 4 Mart. 367.) No such adoption of the Spanish law of contracts was ever had by the people of Upper Louisiana. Their contracts were almost invariably in the French language, and, it is believed, always after the French forms.

The rights of the parties, then, under their marriage contract, are to be determined by the custom of Paris. By the custom of Paris, all the movables entered into and became a part of the common property, as also all immovable property acquired by either spouse during the marriage otherwise than by succession, or by donation or testament, from an ancestor in the direct

ascending line. The immovable property, owned by either spouse at the time of the marriage, did not enter into the community, but remained the separate property (*propre*) of the party to which it belonged. Such was the general rule. Nevertheless, the parties were at liberty, by their marriage contract, to vary the above rule according to their pleasure. They might withhold any or all of their movables from the community, and this was called *realisation*; or they might carry any or all of their immovables into the community, and this was called *ameublisement*. (See LeBrun Trait. Com. 61; Ferriere, Cout. de Paris, III, 60, 63; Pothier, Trait. de la Com. P. 1, c. 3, a 3; 7 Toullier, 252; Duplessis, Traite de la Com. p. 359, 363, 428; Merlin Repertoire voc. Ameublisement; 2 Beaubien, Lois du Bas Canada, 302; 1 Low. Can. Rep. 25)

The lot in question in this cause was carried into the conjugal community by the marriage contract. It is contended for the respondent that the clause of *ameublisement*, in the marriage contract, merely *ameubles* such *propres* as might come to the parties after marriage. This position is not tenable. The insertion of the clause, "*and such as may happen to come and belong to them hereafter, whether by succession, gift, legacy, or otherwise,*" does not so narrow down the effect of the whole clause. A little further examination of the French writers will show the reason of the particular form adopted in the clause under consideration. It was a question among French juriconsults whether a general *ameublisement* of *all property* was effectual to take into community after acquired *propres*. Le Brun decides this question in the affirmative. (Traite de Com. p. 61.) Ferriere inclines to an opposite opinion. (Ferriere, 3, Coutume de Paris, 63.) Pothier leans to the opinion of Ferriere. (Pothier, Traite de Com. P. 1, a 3, u 3.) Toullier, an able writer of the present century, determines this question in favor of the opinion of Le Brun. Although he thinks a conventional community of all property will take in future *propres*, yet with the caution of a prudent

lawyer he says, "*il est bon de l'exprimer dans le contract.*" (7 Toullier, 257.)

With the aid of the extracts that we have given above, there is not the least difficulty in ascertaining the force and meaning of the clause of *ameublisement* in the contract in question. It was the intention of the parties that all their property, present and future, should enter into community; but as there was a doubt suggested by jurists whether the future property should not be particularly named, they were careful to avoid the doubt by naming it expressly in the contract. It certainly would be a curious result in jurisprudence that the words obviously used by the parties to make sure of bringing *all* into community, should be perverted to the purpose of excluding *all* from it.

As the property of the husband, by force of the contract, passed to the community, it remains to be ascertained to whom it passed on the death of the husband. On this subject the custom of Paris is too explicit to admit of any controversy. The 229th article is in these words:

Après le trépas de l'un des dits conjoints, les biens de la dite communauté se divisent en telle manière que la moitié en appartient au survivant et l'autre moitié aux héritiers du trépassé.

After the death of one of the said parties, the property of the said community is divided in such manner that the half of it belongs to the survivor and the other half to the heirs of the deceased.

Property brought into the community by either husband or wife, is not taken back by such party at the dissolution of the community. (See Le Brun, 538; Pothier, p. 1, c. 3, a 3; 1 Demoulin, 871; Duplessis, Cout. de Paris, 428; Ferrière, Cout. de Paris, 270; 7 Toullier, 128.)

It will be proper to consider how the community between Vifvarenne and wife was to be settled according to the terms of their contract. From the mass of the community property, which, by force of the clause of *ameublisement* was all to be regarded as movable, the wife, being the survivor, was entitled to take 400 livres as *preciput*; she was then entitled to take 600 livres from her husband's share for *douaire*, which would

be equivalent to 1200 livres from the community property. The wife then, in the first instance, was to take 1600 livres from the community property, and the residue of the mass of property was to be divided by moieties between her and the children. The right of the children did not attach to the moiety of any particular piece of property, but to the half of the whole *as one mass*, after the rights of the wife were satisfied. Under such circumstances, it was insisted that the action of ejectment would not lie in favor of the representative of the children against the representative of the wife; and defendants' instruction No. 10 was asked and refused.

The inconvenience, or rather the utter impracticability of settling a community in an action of ejectment, strikes the mind at once; and the gross injustice to which it may lead, will appear by attending to another circumstance in this case. The defendants offered to show that the plaintiff had in fact obtained under Vivarenne two by forty arpens of land belonging to the community. Now, nothing can be plainer than that in any fair adjustment of the community between the representatives of the husband and of the wife, they should respectively account for what they had received. But the court below rejected the evidence on the ground, as it would seem, that in an action at law for one piece of property, it was not competent to inquire into the title to other property. It would scarcely be possible to state a more forcible argument against the propriety of allowing parties to an unsettled community to litigate their rights in an action of ejectment, than what is implied in this decision of the court.

Defendants' instruction No. 11 should have been given.

Fourth—Succession.

Waiving now all question about the title to the property in J. B. Vivarenne, and all objections to the particular form of action actually resorted to by the plaintiff, it is to be considered what were the rights of the parties under the marriage contract

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and the law of succession and descent. The plaintiff contends that whatever right of property the wife had in the husband's immovables, by force of the marriage contract, was lost on her

Second Marriage.

The Spanish law on this subject is mainly borrowed from the civil law. By the provisions of the civil law, husband or wife resorting to second nuptials, was required to reserve for the children of the first marriage all property acquired from the former spouse by mere *lucrative* title, or, as it is expressed by Domat, "every thing that is given by the law or by the marriage contract, *in favor of one party*, out of the property of the other." The rule, however, did not extend to patrimonial property, or to such as the party had acquired by his own industry, or by any other *onerous* title. The subject is fully explained in 2 Domat, secs. 3431-3439. The Spanish law was to the same effect. Febrero says :

La muger que contrae segundas nupcias esta obligada a reservar a los hijos de su primer matrimonio la propiedad de todos los bienes que hubo de su marido por arras, testamento, fideicomiso, legado, donacion entre vivos o por causa de muerte, y por otro qualquier titulo *lucrativo*.

The wife who contracts second nuptials is obliged to reserve to the children of her first marriage the property in all the effects which she had from her husband in the way of *arras*, testament, trust, legacy, gift *inter vivos* or *causa mortis*, or by any other *lucrative* title.

Pero de los bienes que multiplican y adquieren con su industria constante matrimonio, nada tienen obligacion de reservarles, aunque se casen muchas veces y del tal matrimonio en que adquirieron los bienes hayan hijos, antes bien pueden disponer de ellos como de los patrimoniales, por que los adquieren con su industria y trabajo, que es *titulo oneroso*. (7 Feb. 242.)

But in respect to the property which is produced and acquired by industry during the marriage, they are under no obligation to reserve it, though they marry many times, and though of the marriage in which it is acquired, children are born ; on the contrary, they may dispose of it as patrimonial, because they acquired it by industry and labor, which is an *onerous* title.

For definitions of the terms *onerous* and *lucrative*, as applied to titles, see Escriche, Dicc. voc. Bienes reservables. Ganancial property was not at all affected by the law of second

nuptials. (5 Feb. 276; 14th Law of Toro. Nov. Recop. lib. 10, tit. 4.) There appears to be little difficulty in determining the true character of the title of the wife to one half of the immovables of the husband, brought into the community by the contract. The husband, by the clause of *ameublissement*, made no gift to the wife. The same clause carried into community the property of the wife. The title of the wife, therefore, under the clause of *ameublissement*, was bought and paid for by an equivalent expressed in the contract. If this was not an *onerous* title on the part of the wife, there is difficulty in ascertaining the true distinction between *onerous* and *lucrative* titles.

Plaintiff's instruction No. 8 should not have been given. The use of the phrase, "*or in any other manner*," effectually cut off all possible claim of defendants through Genevieve Cardinal. In any supposable case, the law of the court below was, that Genevieve Cardinal could take no transmissible interest from J. B. Vifvarenne, if he were her first husband. Defendants' instruction No. 14 should have been given.

On the hypothesis that J. B. Vifvarenne, at the time of his death, was the owner of the lot in controversy, and that the title in whole or in part passed to his son Louis, it remains to be considered to whom the title passed on the death of the latter. The rights of the parties may depend on the time when Louis, the son, died. There was evidence tending to show that he died before 1804; there was other evidence tending to show that he died in 1813. Up to September 1, 1807, the Spanish law of succession prevailed; at that date a new law was introduced. If Louis Vifvarenne died before September 1, 1807, the rights of the parties may, to some extent, come to be determined according to the

Spanish Law of Succession.

The plaintiff claimed the property in controversy under the descendants of the paternal aunts of Louis Vifvarenne. The defendants exhibited a deed from the half-brothers of Louis

Vifvarenne, on the mother's side. The question now is, which is to be preferred, according to the Spanish law of succession—brothers of the half-blood, or aunts and their descendants?

The Spanish law, in this particular, does not materially differ from the civil law, as contained in the 118th novell of Justinian. This celebrated novell, which has been adopted into the jurisprudence of the greater part of the civilized world, made no distinction among the collaterals of the whole blood and of the half-blood, except in respect to brothers and their descendants. No regard was had to the side or line by which the property came to the decedent, but the whole succession passed by one uniform rule. The first order of succession among collaterals consisted of brothers of the whole blood and their descendants, who wholly excluded brothers of the half-blood. The second order was brothers of the half-blood, who excluded uncles and aunts, and all remoter collaterals. If, therefore, the decedent left half-brothers by either side, and aunts or their descendants, by the civil law, there being no nearer heirs, the half-brothers would take all, and the aunts or their descendants nothing. (2 Domat's Civil Law, sec. 2928 *et seq.*)

The Spanish law was the same. In one particular, however, it differed perhaps from the civil law. When the decedent left no brothers of the whole blood, but brothers of the half-blood on each side, then, by the Spanish law, regard was had to the side by which the property came to the decedent; in suchwise that property, coming from the father, passed to the half-brothers on the father's side, and that coming from the mother, to the half-brothers on the mother's side. This was the only instance in which any attention was paid to the line by which property came to the decedent; and the rule was never extended beyond brothers and their descendants. In all cases, brothers of the half-blood would exclude uncles and aunts, by whichever side or line the property came to the decedent.

[Counsel here gave lengthy translations from Escriche's Dictionary of Jurisprudence, and from Febrero, sustaining the rules of the Spanish law of succession as laid down.—REP.]

See also Schmidt's Civil Laws of Spain, 265; 1 White's Recop. 116. Defendants' instruction No. 16 was, therefore, improperly refused. It should have been left to the jury to determine the date of the death of Louis Vifvarenne. As the court ruled it, the true date of his death became of no importance whatever.

Territorial Law of Descent.

This act went into effect September 1st, 1807. (See 1 Ter. Laws, 125.) It superseded the Spanish law of succession.

I. The statute has no application to property acquired by the intestate, before the passage of the act, for the plain reason that no such title as that mentioned in the above section was known to the law before the statute was enacted. It is not pretended that Louis Vifvarenne, the intestate, ever acquired any interest in the property in dispute, by devise or gift; or even by descent, strictly speaking. It is, however, insisted by the plaintiff's counsel, that he acquired it by a title equivalent or at least analogous to *descent*; that is, by *succession*, under the Spanish law.

The Spanish law of succession differed widely from the English common law of descent. The last mentioned law, adopting a classification of things peculiar to itself, transmitted to the ordinary the title of the decedent to all his *personal* property, and cast upon the heir, by mere operation of law, the title to all his *real* property. In the Spanish law, the common law classification of things was not at all regarded. There was, indeed, for some purposes a distinction made between property *movable* and *immovable*; but it was essentially different from the common law division of property into *personal* and *real*. For instance, a term, whether of long or short duration, was by the English law a chattel; by the Spanish law, it was an immovable. So the stock of a farm, whether cattle, implements of husbandry or the like, was *personal* by the common law, and *immovable* by the Spanish law.

(Escriche, Dicc. voc. Bienes inmuebles.) But in the matter of *succession*, the Spanish law paid no attention to this classification of property, whether natural or arbitrary. The whole property of the decedent, *real* or *personal*, *immovable* or *movable*, was *welded into one mass*, and passed to the heirs by one common title. When partition came to be made among the heirs, the same rule was observed. It was a distribution of values, not a partition in kind. (Escriche, Dicc. voc. Sucesion, Herencia, Particion de Herencia.) For the sake of illustration, let it be supposed that the elder Vifvarenne, at the time of his decease in 1781, left for succession to his two children the lot of land now in controversy, worth then one hundred livres (say twenty dollars), and also a bag containing one hundred livres in coin. On a partition had according to the Spanish law, between the two sons, Louis takes the lot of land and François the bag of coin. Unquestionably, in 1781, they took their several parts by one and the same title. Did the legislature of Missouri, in 1807, seriously propose to itself to change the character of these titles, and make one a title by the English law of descent, and the other a title under the English statute of distribution? But this is not all. It has been shown that all the property of the elder Vifvarenne was carried into community by the marriage contract. Upon the dissolution of the community, partition of the property would be made between the survivor and the heirs of the first deceased, as in cases of succession; that is, the whole property, without distinction of nature, quality or legal character, would be comprised in *one mass*, and each party would take out the *share in value* to which he was entitled. (See the form of partition of community property under the Spanish law, 5 Febr. 429 *et seq.*) Suppose, then, that the elder Vifvarenne left at his decease, as property of the community, the lot now in controversy, worth 100 livres (made a movable by the marriage contract), a bag of coin of 100 livres, and another lot belonging to the wife (made movable by the contract), worth 200 livres: on a partition of the property, the wife takes out the

husband's lot and the bag of coin, and Louis and François take the lot brought in by the wife, being the equivalent of what their mother has received: is the title of the children different from that of the mother? Do they claim by *descent* from their father? Or, after all, does the title under the statute of 1807 depend wholly upon the accident of the Spanish partition forty years before? It is manifest that an attempt to apply the statute of 1807 to property acquired under a wholly different state of the law, runs at once to absurdity. The conclusion is, that the legislative power, in 1807, never contemplated an inquiry into the origin of a title prior to the date of the statute under consideration, but intended to lay down a rule for the future, to apply only to descents, devisees or gifts that might afterwards happen. In fact, upon any other hypothesis, the act is retrospective, giving to a title to property a new and different quality. This court did not hesitate to declare that an act of the legislature changing the quality of an artificial person, such as an administrator, was unconstitutional and void. (*Frye v. Kimball*, 16 Mo. 9.)

II. Under the statute of 1807, brothers of the half-blood were entitled to the inheritance, in preference to uncles or aunts, or their descendants on the side by which the property came to the intestate. It becomes necessary here to state the provisions of the law under consideration somewhat more particularly. The 6th and 7th sections are applicable only to widows and descendants, and may be left out of view. The 8th section gives to the father, in case the decedent left no widow nor descendants, a life estate in the property of the intestate, unless it came from the part of the mother; in which case, "*it shall descend as if the intestate had survived the father.*" The 9th section gives to the brothers and sisters, and their descendants, the inheritance, to be distributed among them as tenants in common after the death of the father. The 10th and 17th sections contain the like provisions in respect to the mother, declaring that, "if the estate came from the part of the father, it shall pass *as if the intestate had survived*

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the mother." The last clause of the 11th section, the 12th section, and part of the 14th section of the act are as follows: "And in the same manner the estate of any intestate, leaving neither widow nor lawful issue, nor father and mother, but brothers and sisters, shall be *distributed* among the brothers and sisters of such intestate, or their representatives."

"Sec. 12. There shall be no distinction in the *distribution* of any intestate's estate between kindred of the whole or half-blood, unless when the inheritance came to the said person so seized by descent, devise or gift, of some one of his or her ancestors; in which case, all those who are not of the blood of such ancestors shall be excluded from such inheritance.

"Sec. 14. The real and personal estate and slaves of any person dying intestate, in case such person leaves neither widow nor lineal descendants, nor father or mother, nor brother or sister, nor lawful issue of any brother or sister, shall descend to and be divided amongst the next of kin of equal degree," &c.

The question now is, whether it was the intention of the legislative authority, by the 12th section, as quoted above, to exclude those of the half-blood, absolutely, *out and out*, so as to admit those standing in a more distant degree, or simply to exclude them when claiming against those who stood in equal degree.

The defendants insist that brothers of the half-blood are entitled to the inheritance as against more remote relations.

1. The last clause of the 11th section directs *distribution* among brothers and sisters and their representatives. The 12th section declares the rule of *distribution* among those of the whole and half-blood. Now, there can be no case of *distribution* unless the parties stand in the same degree. Brothers of the whole blood might exclude brothers of the half-blood in a question of distribution; but there never could arise any question of *distribution* between brothers and remoter kindred. It would become simply a question of preference, priority, exclusion. Accordingly, half-blood brothers would take nothing when there were brothers of the whole blood claiming the inheritance; for this would be the actual case of *distribution* men-

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tioned in the statute. But in a case where no brothers of the whole blood exist, no *distribution* in respect to half-blood brothers and remoter kindred is to be had; but the rights of the parties depend simply on their proximity to the intestate; and the half-brothers were plainly entitled to the estate under the letter of the 11th section.

2. There can not possibly be any of the half-blood beyond brothers or sisters and their descendants, as that term *half-blood* is understood in the law. Consequently, the 12th section of the statute under consideration has no application to any case except that in which a controversy arises among brothers or sisters and their descendants. It certainly has no application to the present case, as the dispute between the half-brothers and paternal aunts of Louis Vifvarenne does not at all turn on the *quantum* of the intestate's blood that they might have in their veins, but, as the plaintiff insists, on their relation by blood to the father of the intestate. In short, the 12th section of the statute is extended far beyond its terms by the counsel of the plaintiff, and is made to embrace all cases of the *whole blood* to the intestate when there happens not to be blood relationship to the first purchaser.

3. The statute itself has furnished a sure guide to its just interpretation. When the intention existed to exclude, *out and out*, the father and mother from the inheritance, this intention was expressed in plain and unequivocal language. Accordingly, in the 8th and 17th sections, it is enacted that, *where the estate came from one parent, it should descend as if the intestate had survived the other parent*. Now, if there was the same intention to exclude the brothers of the half-blood absolutely by the 12th section, how happens it that the plain terms of the 8th and 17th sections were not adopted?

4. By the 14th section of the statute under consideration, the paternal aunts of the intestate, as next of kin, were entitled to inherit only in the event that the intestate "*leaves no brother*." But Louis Vifvarenne, the intestate, did leave two brothers. How, then, can the plaintiff make out a title under the

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aunts? He proposes to do it by interpolating, in the statute, after the word "*brother*," the words "*of the blood of the first purchaser*." The court, then, is called upon to make a new law to suit the plaintiff's case. In this aspect of the case, the inquiry would be, not what the law was, but what it ought to have been. This question should have been discussed fifty years ago.

5. But the 12th section must be construed in reference to the antecedent law. Now, it has already appeared that, under the Spanish law, the brothers of the whole blood would entirely exclude brothers of the half-blood from an inheritance, however acquired. The section of the law under consideration professes to limit this rule to the case where the inheritance was acquired by the side to which the brother of the half-blood was not related. Under the plaintiff's construction, however, this section was not a limitation upon a pre-existing distinction between the whole and half-blood, but was itself an independent rule of absolute exclusion, and is to be applied even to the case of the whole blood, as will presently appear. Defendants' instruction on this point, No. 18, should have been given.

III. Conceding now, for the sake of the argument, that the half-blood brothers, under whom the defendants claim, were absolutely excluded by the terms of the 12th section, it remains to be considered who, then, was the *next of kin* under the 14th section of act? The plaintiff proved that the Pawnee grandmother of Louis Vifvarenne was living about 1817. This was four years after the death of Louis Cardinal at Opelousas.

Under the civil and Spanish laws, the grandmother, as sole surviving ascendant, there being no descendants, would have been entitled to the whole inheritance. Under the English statute of distributions, it has uniformly been held that the grandmother, as *next of kin*, would entirely exclude uncles and aunts who stand in one degree more remote. (2 Williams on Executors, 928.) The result is, that the grandmother took the whole estate, and the plaintiff is left without any title whatever.

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There certainly is not a line or a word in the act that impairs the right of the grandmother, as next of kin, after the brothers of the deceased.

In vain will the plaintiff invoke the provisions of the 12th section; for that section has performed its office, by making the proper *distinction* between the whole and the half-blood, and by removing the half-blood out of the way of the next of kin. Finally, the plaintiff's counsel are driven to insist that a construction of the statute excluding the half-brothers and letting in their grandmother, is absurd. This must be admitted. The consequence is that the plaintiff's construction, excluding from the inheritance brothers of the half-blood, in favor of remoter kindred, is disproved by a logical *reductio ad absurdum*.

Defendants' instruction No. 19 should have been given. The proposition advanced in this instruction rests upon an interpretation of the 12th section of the law of 1807, making the *descent* there spoken of the *immediate descent* to the intestate. It is believed that such is the just interpretation of the section. (See *Gardner v. Collins*, 2 Peters, 51; *Den v. Jones*, 3 Hals. 340; *Curren v. Taylor*, 19 Ohio, 36.) There was no question made between the parties that at least one quarter part of the property in dispute was derived by succession from François, either immediately or through the common mother.

Mr. T. T. Gantt argued in a written brief and also orally the following points: 1. Instruction No. 5 for plaintiff is erroneous. It is not true that the claim accompanying a possession and making it adverse must be shown by a deed. A deed shows the extent of a person's claim perhaps more accurately than it could otherwise be evidenced; but to tell the jury that it can be shown only by a deed, is to mislead them. So also it is erroneous to rule that this claim must appear by "a deed purporting to convey the legal title." Which of the jury is competent to decide when the deed purports to convey the legal

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title. The phrase "without interruption *or omission*" tended to mislead the jury. 2. Defendants' instructions Nos. 24, 25, 26 and 27, were improperly refused. They contain a correct exposition of the law. 3. The two instructions numbered 28 and 29, are also correct expositions of the law. They do not state the doctrine on the subject of possession as strongly as the defendants were entitled to demand that it should be. There was gross error and impropriety on the part of the court below, in withdrawing these instructions from the jury after the argument of the cause, and giving in lieu thereof instruction marked 6. This last mentioned instruction is contradictory to itself, to authority and to reason. The intimation accompanying it, (marked instruction No. 9,) is such an interference with the province of the jury, that for this alone the judgment of the court below should be reversed. In aid of these propositions the following authorities are cited: Boyce v. Blake, 2 Dana, 127; Cates v. Loftus' heirs, 4 Monr. 442; Ellicott v. Pearl, 10 Pet. 412, 442; Lee v. McDaniel, 1 Marsh. 234; Hopkins v. Robinson, 3 Watts, 205; Smith's heirs v. Frost's devisee, 2 Dana, 148; 4 Bibb, 559; Fox v. Hunter, 4 Bibb, 563; Sicaid v. Davis, 6 Pet. 124, 139. The case of Saxton v. Hunt, 1 Spencer, 487, will be found, on examination, to go no further than the cases in 2 Dana, 349, and 4 Bibb, 559. The case in 1 Spencer merely decided that an *actual* possession can be admitted only by an adverse *actual* entry, not by a *constructive* entry. No lawyer denies this. The case of Farrar v. Eastman, 10 Maine, (1 Fairf.) 191, 165, is really an authority to the same effect as those cited from Kentucky. It is plain that, had the two tracts *adjoined*, the opinion of the court would have been different. The decision turns on the fact of the two tracts not touching each other. (See also 2 Maine, 275; 1 McLean, 214, 265; 3 *id.* 457.) That the statute of limitations did commence running before the survey in 1826, see Landes v. Perkins, 12 Mo. 138.

Geyer, Lord and Williams, for respondent. Mr. Lord, in a printed brief, made the following points: 1. Waddingham,

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one of the defendants, was properly admitted to testify as to his possession of the property in controversy. 2. The testimony offered by defendants to the effect "that, prior to the commencement of this suit, the plaintiff, and others in privity with him, entered into the possession of the lot in the common fields, situate north of Condé," &c., was properly excluded. Both parties claim the *same* lot, and both claim it under Vifvarenne. 3. The court properly excluded the paper purporting to be the deposition of Rene Paul, taken before two justices of the peace, in a case wherein Hempstead was plaintiff, and Thomas, defendant. There was no privity between the parties to that suit and the plaintiff. The testimony purported to be taken in August, 1844, and was not filed until April, 1845. It could not have been read, if objected to, in the cause in which it purported to be taken. 4. The letter of Martin Thomas, dated April 2d, 1839, to the school commissioners, was wholly irrelevant. 5. The instructions given on the statute of limitations put the case fairly before the jury, and were as favorable towards the defendants as the case would bear. (See 1 Cow. 286; 1 Root, 412; 6 Cow. 623, 725; Adams on Eject. 484; 12 N. H. 9; 1 Dev. & Bat. 546; 1 Fairfield, 191; 6 Har. & J. 836; 1 Wash. C. C. 70, 80; 6 Ham. 87; 9 Johns. 306; 10 Wend. 411; 2 A. K. Marsh. 454.) 6. There is no proof in this case that Lirette was the last person in possession of the lot in controversy prior to December 20, 1803; even if Lirette had occupied the said lot after his conveyance to Vifvarenne, his occupation would have enured to the benefit of the latter. Defendants' instructions Nos. 5 and 6 were, therefore, properly refused; so also those marked 7 and 8. 7. Defendants' instructions 9 and 20, upon the effect to be given to the inventory given in the evidence by defendants, were properly refused. 8. The land in controversy being the separate property of J. B. Vifavarenne, did not, on the marriage of the said Vifvarenne, enter into a community established between him and his wife, Genevieve. It remained his separate property, and at his death passed to his heirs. (Childress v. Cut-

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ter, 16 Mo. 24; 1 White Recop. 51, 63; 10 Mo. 318; 9 Mart. 217; Schmidt's Civil Law of Spain and Mexico, 13; 4 La. Ann. 250; 4 Mart. N. S. 212, 221; 2 La. Ann. 226; 5 Mart. N. S. 98; 19 Louis. 329; 17 Louis. 251; 3 La. Ann. 611; 5 Rob. 299; 6 Pothier, 59, 97, 122, 199, 208-9.) The marriage contract did not make it community property. 9. Upon the death of François and the mother, Genevieve, the land in question vested absolutely in Louis Vifvarenne, and he having died after 1807, the question of descent must be determined by the territorial act of July 4, 1807, which we say passed the land to his aunts upon the side of his father, and not to the brothers of the half-blood under whom defendants claim. As to that portion, viz., one half, which came to Louis directly and immediately by descent or succession from his father, J. B. Vifvarenne, there can be no doubt that the brothers of the half-blood, Charles and Tous-saint, were "excluded from the inheritance" by the 12th section of the act of 1807, as not being "of the blood" of said J. B. V. (1 Terr. Laws, 130, 131; Childress v. Cutter, 16 Mo. 44.) As to that portion of the estate which, upon the death of J. B. Vifvarenne, passed to François, and finally to Louis, the half-brothers are excluded wholly from inheriting it, not being "of the blood" of J. B. Vifvarenne in the sense of the 12th section of the act of 1807. This exclusion of those "not of the blood" of the ancestor, is not restricted to an exclusion of those only who are not of the blood of the immediate ancestor. All are excluded who are not "of the blood" of the ancestor from whom the estate originally came. (4 Kent's Com. 404 n.; Lewis v. Gorman, 5 Barr, 164; Maffit v. Clark, 6 W. & S. 258; Hart's Appeal, 8 Barr, 32; Bevan v. Taylor, 7 S. & R. 397; Hartman's Estate, 4 Rawle, 39; 5 Watts, 113; Brewster v. Benedict, 14 Ohio, 358; Stewart's lessee v. Jones, 8 Gill & Jo. 1.)

W. L. Williams referred *arguendo* to the following authorities: 4 Whart. 259; Paine, 457; 1 Spear, 225; 7 Wheat. 59; Prest. on Abstr. of T. 383; 11 Pet. 41; 7 S. & R. 129;

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4 Wash. C. C. 356; 9 Watts, 28; 10 id. 141; 8 id. 78; 3 Whart. 538, 55; 3 S. & R. 291; 10 id. 303; 2 Johns. 230; 1 Barr, 296; 9 Humph. 762-771; 1 Mass. 483; 4 id. 416; 7 id. 381; 1 Calif. 581; 12 N. H. 9.

LEONARD, Judge, delivered the opinion of the court.

This is a suit to recover possession of a forty arpent lot of ground, now in the city of St. Louis, originally granted to Lirette in 1769, and sold by him in 1774 to John B. Vifvarenne. The title of both parties is derived from Vifvarenne. The plaintiff's claim from the last surviving child, Louis Vifvarenne, by conveyances from the descendants of his two surviving paternal aunts, his next of kin of the blood of his father; and the defendants derive their title from three half-brothers of Louis Vifvarenne, children of the mother, by Jacques Marechal, her second husband, insisting that the half-brothers succeeded to the whole lot as heirs to their mother and half-brother, one or both, to the exclusion of the paternal aunts.

The questions discussed involve the law of property between husband and wife as it stood here in 1777 when the marriage contract between J. B. Vifvarenne and wife was entered into, the Spanish law of second marriage, the law of successions down to the American law of descents and distributions, introduced by the territorial act of 1807, and the proper construction of the twelfth section of that act. The defendant raised other questions in reference to the statute of limitations, and the presumption of title proper to be made under the circumstances of the case.

We remark that the case involves a large amount of property, and that the questions discussed and to be decided depend upon a foreign system of law quite different from that to which we were bred, and with which, of course, we have very little familiarity. These questions, too, spring out of the transactions of a foreign race of men, the French inhabitants of this city, whose manners and customs as well as institutions, both

legal and social, were very different from our own. We have therefore approached the case with a corresponding distrust in the correctness of the conclusions to which we should come. But it was our duty to decide, and having given to the subject the most deliberate and attentive consideration that we are capable of, we proceed now to state, as briefly as possible, our opinion, without however claiming for its correctness that deference and respect that the place from which it is pronounced would otherwise entitle it.

The marriage contract between J. B. Vifvarenne and his wife, Genevieve Cardinal, was dated 5th August, 1777, Vifvarenne being then the owner of the lot in question. The husband died in 1781 or '82, leaving surviving him his wife and two children of the marriage, Louis and Francis. The mother subsequently married J. Marechal, and died about the 2d of November, 1792, leaving surviving her three children of this marriage. The children of the first marriage, Louis and Francis Vifvarenne, died many years ago, without any descendants, leaving surviving them their three half-brothers, the source of the defendant's title, and two paternal aunts, from whom the title on the other side comes.

1. We begin with an inquiry into Madame Cardinal's title, alleged to have been required by force of the marriage contract, and the first question that meets us at the very threshold is, what law prevailed here then? the customary law of Paris, which the French colonists brought with them to Louisiana, as their right under their king's charter; or had that law been at that time superseded by the law of the new sovereign?

In 1816, the supreme court of Louisiana decided, in *Beard v. Poydras*, 4 Mart. 367, that the Spanish law was introduced into the province of Louisiana by the Spanish authorities, shortly after O'Reilly's proclamation issued in 1769, upon taking possession of the country, and that it came, if not by the mere legal force of that instrument, at least by the practical adoption of it which followed immediately upon the accession of the Spanish authorities to the government of the coun-

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try. Mr. Jefferson insisted, in the celebrated *Batture* case, (2 State papers—public lands 1,) that this proclamation only changed the civil organization and the form of judicial proceedings, and that the French law still continued in force in reference to the civil rights of the inhabitants. However, that opinion it seems has not prevailed, the opinion of the supreme court of Louisiana having, we believe, been generally recognized and acted upon, not only in that state but here also. Indeed, in the present case, the appeal is made by both parties, as if by common consent, to the Spanish law of successions and of second marriages, for the purpose of ascertaining the rights of the parties; and some of these rights accrued only a few years after the date of the contract.

2. We assume then that the Spanish law was prevailing here as early as 1777, and that law, it will be seen, would not allow parties to introduce by contract a foreign law to regulate affairs, no matter how unimportant; and with much greater reason would they be prohibited from introducing a foreign law to regulate the property relations of husband and wife, a matter everywhere, under every system of law, of the first importance, and never left unprovided for.

In the *Partidas*, (3 Tit. 14, law 15,) it is said: "If the laws of jurisprudence of another country, over which our authority does not extend, should be appealed to, we order that in our dominions they shall not be received as evidence, except in disputes arising between individuals of such foreign country or contracts made there." In *Bourcier v. Lanux*, 3 Mart. 581, the question was as to the validity of a contested sale of community property, and as the sale was valid by the French law, and the parties, by their marriage contract, which was made in Louisiana after the accession of the Spanish government, had submitted themselves to that law, it became necessary to decide the very question now before us, and the court held that under the Spanish law, then in force in Louisiana, it was not competent for parties, by special agreement, to introduce a foreign law for the regulation of the conjugal community, and there-

fore, as the sale lacked the necessary Spanish solemnities, it was void, no matter how it might be under the French law. Indeed, this is a principle of universal jurisprudence, and almost of necessity adopted and acted upon in every civilized community. No one can fail to see the great uncertainty and confusion that would prevail where such things were allowed and generally put in practice. There is a special provision in the present written code of Louisiana, allowing parties, about to marry there, to regulate their mutual rights of property according to the laws of any other State of this Union; and no one supposes that if this contract were to be executed here to-day between competent parties that it would confer upon either the rights of property that would exist under it by the French law. What then, in 1777, was the Spanish law of husband and wife, in relation to the property of each other, present and future? What changes could the parties make in it by express agreement? And what changes were in fact made in the present case in reference to this property by the contract given in evidence? The Roman law must be looked to as the original of the Spanish law upon this subject, although, of course, it has been greatly changed in the long lapse of years, both by usage and by the written laws of the Spanish sovereigns. There, husband and wife, were considered in reference to each other's property as distinct persons—each one enjoying and exercising, in his own name, all the rights of ownership over what belonged to him. The marriage union itself did not confer upon either party the property, or any rights in the property, of the other. The husband was bound to support the wife during the marriage and was entitled to her earnings, and on his death she was allowed a provision out of his succession, not exceeding a certain proportion, for her support, if she had not property enough of her own for that purpose. Of course it was competent, where a marriage took place, for the parties and their relations and friends to make gifts to the spouses on account of marriage, and these were governed by laws peculiar to such transactions; and the parties themselves were also at

liberty to make any mutual agreement with one another in reference to their property, present and future, and for its administration during the marriage, and distribution when the marriage union came to be dissolved.

There does not seem to have been any conjugal community of goods in the Roman law, and the institution of ganancial property, or the community of gains, found in the Spanish law, as incident to the relation of husband and wife, is, we are told, one of the few institutions for which that law is not indebted to Roman jurisprudence, although even this is said not to be supported by the unanimous assent of writers, some of whom insist that among the ancient Romans, as far back as Romulus and Numa, all property acquired during the marriage was ganancial or common. It seems also to have been even of modern growth in Spain, for we are told that no mention is made of it in the Partidas. Custom gave rise to it, and the first recognition of it by the "*lex scripta*," is said to be the notice taken of it in L. 17, Tit. 2, Lib. 4, Del Fuero Juzgo. (Institutes of the Civil Law of Spain, by Aso and Manuel, translated by Judge Johnson, of Trinidad, and found in White's Compilation, book 1, Tit. 7, note 43.) There does not seem to be any controversy (or, indeed, ground for controversy) as to the character of the Spanish customary conjugal community in relation either to the property that goes in it, the manner in which it is administered during the marriage, or as to how it is distributed when the marriage is dissolved. We will refer, however, to some authorities in reference to this matter, and begin with the explanation of certain terms used in the Spanish law at the time of the Partidas, before the Spanish customary community had been established.

Dowry, or *dote*, "is that which the wife gives the husband on account of marriage, and is a sort of donation made with a view to his maintenance and to the support of the marriage;" and, "*arras*, is that which the husband gives the woman on account of marriage." 1 Partidas, 507 and 508. "Although they put each other into possession (of these donations), yet

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the husband ought to remain master and have control of the whole, and receive the fruits in general, as well of that which the wife has given, as of that which he had given himself, for the maintenance of himself, his wife and family, as well as for the proper support of the marriage." 1 Partidas, 514. Paraphernalia is "all the estate and things, whether movable or immovable, which the wife retains separately, and which are not comprehended in the dowry." 1 M. & C's. Partidas, 523.

In the Institutes of the Civil Law of Spain, before referred to, the rules of this customary community are very fully explained, and we make several short extracts from book 1, Tit. 7, chap. 5. "The right to ganancias is founded in the partnership which is supposed to exist between the husband and wife, because she bringing her fortune (*capitales*) in *dote*, gift and paraphernalia, and he his in the estate and property which he possesses, it is directed that the *gains* which result from the joint employment of this mass of property or capital be equally divided between both parties."

"Ganancial property is all that which is increased or multiplied during marriage. By multiplied is understood all that is increased by onerous cause or title, and not that which is acquired by a lucrative one, as inheritance, donation, &c."

From all which it is inferred,

"1st. That what the husband or wife brings into the marriage, his or her own peculiar property, or acquire during it by lucrative cause or title, does not come into partition.

"2d. That the property acquired during marriage, by purchase, sale, or other onerous cause or title, does come into partition."

From the first principle it is inferred, 1st, "that *dote*, arras, marriage gift and paraphernalia, are not ganancial property, or property subject to partition or division."

From the second principle it is deduced, 1st, "that the fruits produced from all these sums (*capitales*) gained and improved during the marriage, come into partition."

It will be seen by reference to these authorities, that this Spanish community is not a community of the existing property of the spouses, but a community of gains, acquisitions, profits, made during the marriage, like the ordinary community of the Roman law, and the modern partnerships of the commercial world—into which whatever is put by the partners, goes in as capital and is refunded before the profits are declared; that the administration of its affairs is given to the husband to the exclusion of the wife, the gains to be applied to the support of the family, and that upon its dissolution the capital put in by each partner is restored, and the residue (the gains), after the payment of the debts, equally divided between them; and such, we believe, is the view of this matter always heretofore taken in this court.

It was competent, however, for the parties to alter, by their agreement, the provisions of the legal community; they were at liberty to create a conventional one, different from that ordained by the law; and it is insisted that they have done so, and that this is a community of all the property of the spouses present and to come, in suchwise, that upon its dissolution all belongs to them, both that put in and that afterwards acquired, like the gananciales of the Spanish community, and must be divided in like manner.

3. The contract is, we understand, in the usual form of a French marriage contract. The first provision declares that the future spouses shall be "one and common in all goods movable, and acquisitions immovable, according to the ancient custom established in the colony, to which the said parties submit themselves by reason of the present contract." And this, we are told, is the very language in which the custom of Paris describes the community of goods which is instituted by that law upon the mere fact of marriage. A subsequent clause in the contract—the clause of "*ameublisement*" as it is called—provides, that "the future spouses take each other with the property and rights to them now belonging, and such as may happen to come and belong to them hereafter, whether by suc-

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cession, gift, legacy or otherwise ; which property, from which side soever it may come, shall wholly enter into the community without any reserve;" and this we are told has the effect, by the custom of Paris, of converting the lot into a movable, for the purpose of the contract, and carrying it, as such, into the community, with all the incidents annexed by the " custom" to the movables of the parties.

It is then argued that the French conjugal community differs both from an ordinary partnership and the Spanish community of husband and wife, in the distribution that is to be made of its effects upon a dissolution. We are referred to the 229th article of the custom of Paris, for the rule that " after the death of one of said parties, the property of the community is divided in such manner that the half of it belongs to the survivor, and the other half to the heirs of the deceased ;" and are told that Le Brun, a French writer, after examining, on principles of natural equity, the question whether property brought into the community of husband and wife, should be taken back upon its dissolution, and stating the conflicting opinions of other writers, remarks in favor of the negative opinion, that " usage has confirmed this so absolutely for our communities *between spouses*, that no commentator has found any difficulty in respect to it." Now, admitting all this to be true, the vice of the argument is, that it assumes either that the customary law of Paris was the law here when the contract was made, or, if not, that the parties introduced it by their agreement. It may be conceded, that if the parties had expressly provided that every thing that entered the community should be divided as profits equally between them, that provision would have been effectual. But that is not done here. The parties have not provided how the partition shall be made by any words expressive of that intention taken by themselves, and without reference to some custom or law upon the subject. They have agreed " to be one and common in their movables," and that " their immovables shall also enter into the community ;" and if they had stopped there, these clauses must have

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been construed by reference to some custom or system of law, or entirely disregarded as too indefinite to be carried into execution. This is the case with all contracts expressed in general terms. They must be understood and interpreted by reference to some law, or altogether fail of effect. The counsel for the defendants were fully aware of this, and felt that they must resort to some system of law in order to ascertain the effect of these clauses. The contract may be sufficiently explicit upon its face, without reference to any thing external, to carry the lot into the community; but there are no words in it that fix the character of the community, in reference to the matter now in controversy—the distribution of its effects when it comes to be dissolved. Those, too, who framed this formula of a marriage contract, were aware of this, and therefore made the parties expressly refer to the law or custom that was to govern their community. If the words here used for that purpose must be understood as referring to the existing law of the province, they are lawful, although perhaps superfluous, and will be effectual; but if they refer to the custom of Paris, it is nothing other than an attempt to introduce a foreign law here for the purposes of this contract, and can not prevail. The French law is a sealed book to us in reference to this matter, and the appeal to it is made in vain.

We pursue this subject no further. We are satisfied, and the result is, that Madame Cardinal took no interest in the lot under the marriage contract at the death of her husband, and this is the conclusion to which the court came when the case was last here, although it is now placed on somewhat different grounds.

We do not stop to inquire into the effect of the special donation of six hundred livres, made to the wife. If she thereby became a creditor of the husband, even with a security upon his estate, and this right passed to her succession, it of course can only be exercised in a suit between proper parties, and not in a controversy between purchasers of a lot in the husband's succession, claimed on one side from the husband, and upon the

other side from the wife. If the wife's succession had any such demand, it is enough here that it has not been transferred to these defendants, and they of course can not exercise rights that belong to others.

4. For the Spanish law of succession we must look also to the Roman law upon this subject, to be found in Justinian's celebrated 118th novell, which has become, as it were, the law of the civilized world, on account, we may suppose, of its expressing the general sentiment of mankind in reference to the distribution of a man's property after his death. The great difference between the Roman and the English common law of descents is, that the former looked alone to the intestate, and called his kindred to his succession according to their proximity of relationship, the nearer excluding the more remote, without any reference to the source from which the property was derived. The common law, proceeding upon feudal reasons, after the descendants of the last owner were exhausted, looked to the source from which the property came, and by its sixth canon, adopted, as Blackstone tells us, as a rule of evidence to carry out the preceding canon in favor of the blood of the first purchaser, excluded all the collateral kindred of the last proprietor that were not of the full blood of the intestate. Again, the Roman law, still proceeding upon the same principle, called the three principal lines of kindred to the inheritance in the order of natural affection: first, lineal descendants, then lineal ascendants, and lastly, collaterals; while the common law, upon the same feudal reasons, excluded the lineal ascendants. The civil law, therefore, paid no regard to the line from which the property came, nor to quantity of blood, except in the case of brothers and sisters of the whole blood and their descendants, who took before and to the exclusion of the brothers and sisters of the half-blood.

In all these particulars the Spanish law appears to have corresponded substantially with the Roman law—calling, first, descendants, then ascendants, and, lastly, collaterals; making the same distinction between brothers and sisters of the whole

and the half-blood, and paying no regard to the line from which the property came, except in the single instance of a deceased brother, leaving both paternal and maternal goods, and half-brothers and sisters on both sides.

Applying these rules to the present case, if Francis Vifvarenne died under the Spanish law, leaving no descendants but his mother, and brothers both of the whole and of the half-blood, his mother succeeded to him to the exclusion of all the brothers; and if Louis Vifvarenne afterwards died under the same law without descendants, or ascendants, leaving brothers of the half-blood only, and paternal aunts, the brothers of the half-blood succeeded to the exclusion of the paternal aunts. In reference to the order in which the three lines of kindred are called to the succession, it is to be observed, that the Roman law made an exception in favor of brothers of the full blood of the children, whom it admitted as co-heirs with the ascendants, a privilege, however, not extended to the brothers of the half-blood. But it is assumed, in this case, that the Spanish law made no such distinction in favor of brothers of the full blood, and however this may be, under the view we have taken of the case, the result here would be the same under either rule.

5. It was the Roman law of second marriages, adopted also into the Spanish law, that a forfeiture was thereby incurred to the surviving children of the first husband of all the property that came to the survivor of the deceased spouse. The forfeiture extended to all that came either immediately or through an intestate succession to a deceased child of that marriage; it accrued immediately upon the second marriage, so as to vest the property from that moment in the children, although the woman retained the usufruct during her life; it went to the children of the deceased parent as children, and not to them as heirs; and, finally, it embraced only such things as came to her by a lucrative title, and does not extend to any thing that she derived from husband or child for an onerous cause. Under the Spanish law this forfeiture was incurred by the wife only when she was left a widow over twenty-five, the age of Roman majority.

The questions discussed in this part of the case have been confined to the character of Madame Cardinal's title to the lot, supposing she had acquired an interest in it, under the marriage contract, and to the character of Louis Vifvarenne's title to the part that his brother Francis succeeded to from the father, upon the supposition that this interest descended to the mother and was afterwards forfeited by a second marriage. The first question is already disposed of by our opinion in reference to the effect of the marriage contract, and the other will be better considered in connexion with that part of the case that relates to the proper construction of the law of 1807, in reference to what must be considered a title "by descent, gift or devise," within the act. We may remark here, however, while upon the law of second marriage, that it sufficiently appears from what has been already said, that it is not a title by immediate descent from the father to Louis, although it should be considered as derived remotely from the father through the brother and mother. (Domat's Civil Law, part 2, book 3, tit. 4, secs. 1 and 2, from 3431 to 3443.)

6. The act of 1807 was the first American law of descents introduced here; it superseded the Spanish law of succession, and was a complete scheme, which provided for the whole subject and left nothing to be supplied by any other code. It was the work of men familiar with the common law and strangers to the Roman law, and was no doubt adopted by our territorial lawgivers from the written laws of the older states of the Union, and not constructed here with any special reference to the existing law of this country.

The words of the 12th section are: "There shall be no distinction in the distribution of any intestate's estate between kindred of the whole or half-blood, unless when the inheritance came to the said person so seized by descent, devise or gift, of some one of his or her ancestors, in which case all those who are not of the blood of such ancestors shall be excluded from the inheritance."

The previous sections provide for descendants—for father

and mother, brothers and sisters, and husband and wife. The 13th section contains a general provision for all posthumous children; and then follows the 14th section, calling to the inheritance when there is neither widow nor lineal descendants, nor father or mother, nor brother nor sisters, or their descendants, the next of kin in equal degree. And the defendants insist that the effect of the 12th section is merely to postpone the brothers of the half-blood to those of the full blood, and not to exclude them entirely in favor of more remote kindred; that the provision is confined in its operation to the preceding parts of the act, so as only to effect a repeal of the Spanish preference given to full brothers over half-brothers, and to exclude the common law rule of exclusion from being applied to them, and that it does not extend over the whole statute, providing in the specified cases new stocks of descent, whose blood is to inherit when the lineal descendant of the last owner are exhausted.

The section embraces two distinct provisions: 1. That in the matter of descents there shall be no distinction between the full and the half-blood, except in the cases there specified; and 2. That in those cases, that is, when the estate comes to the intestate by "descent, devise or gift of some one of his ancestors, all who are not of the blood of such ancestor shall be excluded." The first provision is sufficiently explicit, and was probably quite superfluous; the statute having provided a complete scheme of descents and directed what kindred should inherit, without making any distinction on the score of quantity of blood or double relationship; none of course existed; all are brothers and sisters, whether they be of the whole or of the half-blood, and the proximity of relationship is the same, whether the parties derive their blood from the same single ancestor, or from the same pair of ancestors. The effect of the clause no doubt would be, if necessary, to exclude from this law of descents not only the Spanish rule of preference between brothers of the full and of the half-blood, but also the common law rule of entire exclusion. It was, however, quite unnecessary for either purpose, although it was

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no doubt aimed, in the state where the statute was originally constructed, at the common law rule of exclusion, and inserted only out of the abundance of caution.

The other provision of the section is effective in the construction of the statute. When the estate comes by descent, devise or gift, from an ancestor, none shall inherit who are not of the blood of that ancestor. This is not the Roman or Spanish law of preference between brothers of the whole and of the half blood, nor the common law rule of exclusion, but a new canon prescribed by the law given for this new scheme of descents. It is a general provision, extending over the whole statute, and regulating all the cases that may arise, to which it is applicable. What reason is there for limiting it to the first degree of collateral kindred? Such a construction is not warranted by the words used nor by the context; and it would impute to the law-giver the folly of merely repeating what had already been declared in the preceding part of the section, and result in rendering the whole section without any real effect in the operation of the statute. There can not, we think, be any doubt in the matter. Wherever the case that is provided for occurs, none can inherit who are not "of the blood" of the ancestor; and the words, "of the blood," exclude those only who have none of the blood, without reference to proportion or quantity. Those, however, such as have none of the blood are entirely excluded; and then those "of the blood" who stand next in degree of proximity, are, in reference to this inheritance, the next of kin, and take as such. If, therefore, the lot came to Louis Vifvarenne by descent, devise or gift of his father, his half blood brothers are entirely excluded, and his paternal aunts are his next of kin, and inherit, if he died after the law took effect.

Other questions, however, still remain. Does the expression, "come to (him) by descent, devise or gift of some one of his ancestors," limit the acquisition to a proximate and immediate descent, devise or gift from such ancestor directly to the intestate? or does it include a descent, devise or gift, which

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can be deduced mediately from any ancestor, no matter how remote, who was the first purchaser to the intestate? The defendants insist, that it looks only to the immediate descent; and the plaintiffs, that it has reference to the origin of the title in the first purchaser, and only requires that the heir should be of the blood of that purchaser. As to the half of the lot that Louis Vifvarenne took by descent immediately from his father, there is no difficulty. The father was not only the first purchaser, but the ancestor from whom it came by immediate descent, and the half-brothers not being of the blood of the fathers, the paternal aunts inherit as next of kin, as to this half. But the question is important as it regards the other half that descended to François, and thence to his mother, and was afterwards either forfeited by her to Louis Vifvarenne, on her second marriage, or passed on her death to all her children of both marriages, each taking one-fourth.

This question was in the Supreme Court of the United States, in the case of Gardner v. Collins, (2 Pet. 58,) upon a clause in the Rhode Island statute of descents, very similar in its language to our statute. The case was ably and fully argued, and the opinion of the court delivered by Judge Story. He states the question in the case to be, 1st, whether the words "of the blood," include the half or exclusively apply to whole blood; and, 2d, whether the words of the statute, "come by descent, gift or devise from the parent or other kindred of the intestate," mean an immediate descent, &c., or include a descent, &c., which can be deduced from or through any ancestor who was the first purchaser to the intestate; and the opinion of the court was, "that the words 'of the blood' comprehended all persons of the blood, whether of the whole or the half-blood; and that the words, 'come by descent, gift or devise from the parent or other kindred,' &c., mean *immediate* descent, gift or devise, and make the immediate ancestor, donor or devisor the sole stock of the descent."

He remarks, "It is true that in a sense an estate may be said to come by descent from a remote ancestor to a person

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upon whom it has devolved through many intermediate descents. But this, if not loose language, is not that sense that is ordinarily annexed to the term. When an estate is said to have descended from A. to B., the natural and obvious meaning of the words are, that it is an immediate descent from A. to B."

And again: "The cases cited at the bar do, however, demonstrate that in those states where similar language is used in their statutes of descents, the expression has been uniformly construed to mean immediate descents, gifts or devises, unless that construction has been overruled by the context."

We are entirely satisfied with the reasoning by which the court reached its conclusions; and there is nothing in the words or context of our statute to induce us to put a different construction upon them, or to depart from what seems to be the usual interpretation put upon similar language in the statute of other states. We are accordingly of opinion, that the person referred to in the act as the new fountain of inheritable blood, is the ancestor from whom the property came to the intestate by immediate descent, gift or devise.

If, then, Louis Vifvarenne inherited from his brother or mother the half of the lot that first descended to François, they, both mother and brother, constitute new stocks of descent in relation to this property, and the half-brothers being of the blood of both, are not excluded from this inheritance. But if he acquired it by the forfeiture incurred by the second marriage, the plaintiffs insist that this is a title by gift from the father within the meaning of the act. We have construed the statute with reference to the law that prevailed here at the time it was passed, and looking only at substance, without any regard to form, have treated a Spanish title by succession from an intestate as a title by descent, within the meaning of the law; and if we could consider this title as substantially an immediate gift from the father to his son Louis, it would be sufficient to constitute him a new stock of descent as to this part of the lot also. It is true, the father was the original owner of the property, and it is from him that this title may be

said to have been ultimately derived, and that, too, without any value paid or received. Yet it was François and not Louis that was immediately indebted to the father's bounty for this part of the lot. He permitted it to descend to his mother, and the title of Louis Vifvarenne accrues through a forfeiture imposed upon the mother by law. It is to the law then that Louis may be said to be indebted for the property. It is given to him, it is true, as the surviving child of the first marriage, because it came to the mother from the father through a child of the same marriage, and the law directed that the forfeiture it imposed as a penalty upon the second marriage, should accrue to the surviving children of the deceased husband. This forfeiture, however, is not a condition to which the father originally subjected the property, so that those who take under it may be considered as substituted by the terms of the original transaction as objects of the donor's bounty, in the place of the first donee, but is a penalty existing under the law, and therefore subject to be changed or established by law at any time before rights actually attach by reason of a forfeiture. We conclude, therefore, that if the mother forfeited to Louis Vifvarenne what she inherited from François, this was not a title in Louis by the gift of the father, and therefore, as to this interest, the brothers of the half-blood, who are his next of kin, succeed to the exclusion of the paternal aunts.

We do not think the circumstances of this case were such as to entitle the defendants to the instruction they asked as to the presumption of title.

7. In reference to the statute of limitations, we only remark, at present, that, although the possession of part of a connected whole may be and is for many purposes considered the possession of every part of it, yet we are not prepared to concede that these contiguous lots could, under the circumstances, so far as as they have been disclosed, be considered a single tract, to which this rule would be applicable for the purposes of the statute of limitations; and, therefore, if Mullanphy built upon one of the lots and extended the enclosure about the

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house over upon this lot, accidentally, through mistake or ignorance of the boundaries, and without any design of taking possession of it, this is not a possession within the meaning of the statute of limitations; although the actual detention, "*pedis possessio*," exists, there is wanting the intention on the part of the possessor, which is necessary to constitute a civil possession.

8. We remark, further, that we are by no means ready to yield to the doctrine that one who has taken possession of a small proportion of a large lot of ground of the character and situation of the present one, under a deed, not of the lot, but merely of whatever interest the grantor may be found to have in it, has, without any thing more, a possession extending over the whole lot, within the meaning of our law of limitations.

The result of this opinion is, that the judgment must be reversed, and the cause remanded, to be retried in conformity with it; and the other judges concurring, it is so ordered.

SCOTT, Judge. Whether this case is to be regarded as subject to the Spanish law, or to be governed by the custom of Paris, will not materially vary its result. Whether the property, if ameubled, would, after the dissolution of the community, be governed by the Spanish law or the custom of Paris, is a question which was not argued, nor, from the turn the case has taken, is there any necessity for my opinion in relation to it. It seems that, by the custom of Paris, property ameubled was subject to the law of second marriages. Ferriere, in his introduction to the practice, says, "*l'ameublement est sujet a l'edit des secondes noces*." Whilst concurring in the opinion, in other respects, I do not wish to be understood as giving my views whether this contract was to be governed by the Spanish law or by the custom of Paris.

A motion for a rehearing, in this case, was made by plaintiff's counsel and overruled.

Reasons for a rehearing presented by R. M. Field.

The sum of the decision is understood to be that as early as 1777, the date of the marriage contract in question, the body of the Spanish law had been introduced into the district of Illinois, of which St. Louis was then a part; and that the contract appeals to a foreign law as the rule to regulate the rights of the parties, contrary to the express prohibitions of the Spanish law, and is therefore inoperative.

As the points decided were not discussed, nor even suggested at the bar, and as they seriously affect the rights of the parties to this suit, and may become the means of disturbing a great many titles, it is deemed not improper for counsel to present the grounds of the motion for a rehearing somewhat more fully than is usual in ordinary cases.

I. It becomes important, according to the opinion of the court, to ascertain when the Spanish law was introduced among the French inhabitants of the Illinois, so as to abrogate and render null their established forms of contracts. If we are able to say *when* this was done, we ought to be prepared to show *how* it was done. It might be expected that in a case of a cession by one friendly power to another, a change in the whole body of the laws of the ceded country would be preceded by some public act of state promulgated to the people. But it is admitted on all hands that there was no such act on the part of the Spanish authorities that by its own force worked this change of law, in any part of Louisiana. The proclamation of O'Reilly of 25th November, 1769, did not profess to supersede the whole existing body of the French law. It abolished the old municipal government and erected another in its stead. The articles annexed to the proclamation are confined to matters of municipal and police regulation. The instructions prepared by Urristia and Rey, and published along with the proclamation, comprise only six sections, five of which relate only

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to proceedings in courts of justice and to punishments for crimes; one briefly explains the forms of testaments and the rules of succession. Not a word on the subject of private contracts appears in these instructions. They were prepared for the purpose of communicating elementary instruction on certain heads of the Spanish law, in order to pave the way for the introduction at some future day of the whole body of Spanish jurisprudence. The proclamation and instructions may be found at large in American State Papers, vol. 1, miscellaneous, p. 363, *et seq.*

As this proclamation plainly did not by its terms abrogate the great body of the French laws, it became a question in what manner the Spanish law came to be, as in fact it did become, the controlling rule in Lower Louisiana. The prevailing opinion seems to be that the use of Spanish forms in legal proceedings that followed the proclamation, led to the introduction of the whole Spanish law;—in other words, the proclamation led to the use, and the use, in the course of time, introduced the Spanish law, to the entire exclusion of the former system. This is the account of the matter given by Judge Martin, in his history of Louisiana. He says that by usage the Spanish law gradually and imperceptibly supplanted the French, so that the precise time when the transition from the one system to the other became complete, can not be fixed. (2 Martin, 8-14.)

The Supreme Court of Louisiana reasoned upon the subject in the same way, in the case of *Beard v. Poydras*. It held that the Spanish law came into Lower Louisiana by usage consequent upon O'Reilly's proclamation. The case involved the mere question of the *status* of a person depending on facts that occurred subsequently to 1785. The case is undoubtedly of authority to show that the Spanish law was in force in Lower Louisiana at that date; but it falls far short of deciding that the same law had been introduced into the district of Illinois eight years before.

On the part of the defendants it is insisted that O'Reilly's proclamation did not extend to the district of Illinois, and that,

so far from there being any adoption of the Spanish law in this district in the matter of contracts, the usage, up to the date of the contract now in question, was all the other way.

The country of the Illinois, embracing the territory on both sides of the Mississippi river, north of the mouth of the Ohio, was originally settled by the Canadian French. Kaskaskia is said to have been founded in 1682 by LaSalle, on his return from the discovery of the mouth of the Mississippi. This fact has been questioned; but it is unquestionably true that this settlement and several others in the Illinois existed in a flourishing condition full twenty years before the foundations of New Orleans were laid. During the course of the French and Spanish dominations, this country was under a government distinct and separate from that of Lower Louisiana. Its government was indeed subordinate to the latter, just as the latter was subordinate under the French to the government of New France, and, under the Spaniards, to the captain general of Cuba. On the dissolution of the French company of the west in 1732, the king appointed Perier governor of Louisiana and D'Artaguette lieutenant for Illinois. The latter was succeeded by La Buissoniere, and he in his turn in 1751 by the Chevalier Macarty. The last remained in command until the cession of the province. (1 Monette, p. 276, 296.) All these lieutenants held commissions directly from the king. Immediately after the surrender of the eastern part of the Illinois to the British, in 1765, captain St. Ange, a subaltern of Macarty, acting as it may be presumed under the orders of his superior, came over the river and took command of the post at St. Louis. He remained in command until the advent of the Spanish governor, in 1770; and although his grants out of the royal domain have been decided to be inoperative, his general administration as civil commandant is believed to have been strictly legal.

When Spain took possession of the province in 1769, Pieras was appointed lieutenant governor of the Illinois district. From this time forward there is an unbroken series of lieutenant governors for the Illinois district, holding their commis-

sions directly from the crown. Their style of office, up to 1798, was "*Lieutenant Gouverneur des etablissemens des Illinois.*" In the last named year this style was changed to "*Lieutenant Gouverneur de la Haute Louisiane.*" The general powers of these officers in the administration of the public affairs of their district was as great as those of the governor general, subject, however, to revision by appeal to the latter officer. (Stoddard's Louisiana, p. 250, 275.)

The proclamation of O'Reilly makes no mention of the Illinois district. The motive for the changes effected by the proclamation are declared in the preamble to be the forcible resistance opposed to Spanish authority the year before by the people of New Orleans and its vicinity. No such opposition was offered by the people of the Illinois. Rioux, with a party of soldiers, came to St. Louis as early as 1768, and took possession for the Spanish crown, without the slightest resistance on the part of the inhabitants. He remained here a year and was hospitably entertained. (See Primm's Address at St. Louis celebration in 1844.)

Soon after the date of the proclamation, O'Reilly addressed to the commandant at St. Louis long instructions touching the government of Illinois. An imperfect abstract of this document is given in Gayarre's history of Louisiana, under Spain, p. 23. No allusion is made to the proclamation, nor to any actual or proposed change in the laws of the district. It is certainly extraordinary that so important a matter as the total subversion of the whole body of the laws under which the people of Illinois were living, should have been passed over in silence in this communication of O'Reilly.

In February, 1770, O'Reilly published his regulations in respect to grants of land. They will be found at large in American State Papers, vol. 1, miscellaneous, p. 376. In terms, they extend throughout the province. But Stoddard expressed the opinion that they had no force in Illinois, partly because Illinois is not named in the regulations, and partly for the reason that the lieutenant governors, who must have known

the extent of their own powers, practically disregarded them, of which he cites several instances. (Stoddard, 273.)

On the 3d of November, 1770, just five days after O'Reilly left New Orleans to return to Spain, Unzaga, the governor general of Louisiana, issued his own proclamation reciting that frauds had been practiced in the sales of negroes, immovables and real estates, and therefore ordering and decreeing that "no person shall henceforth sell any negroes, plantations, houses, or any kind of sea-craft, except by a deed executed before a notary public, to which shall be annexed the certificate of the registrar of mortgages; that all other acts made under any form shall be null and void," &c. This proclamation was to be promulgated with beat of drum, and a copy sent to all the posts. The proclamation will be found entire in the appendix to Gayarre's history, p. 631. This proclamation certainly was never in force in Illinois, as has been decided repeatedly by this court and the Supreme Court of the United States. If the court will recur to page 69 of the printed record, it will see that the plaintiff's principal title paper of 1774 was not executed according to the forms prescribed by Unzaga, and, according to the terms of the proclamation, it was of no effect. But this proclamation is not cited for the purpose of proving the invalidity of that title paper. It is brought to the notice of the court to illustrate the great powers claimed and exercised by the Spanish governors, and to show that proclamations issuing from the officers of Lower Louisiana were not regarded as extending to Illinois.

The practice and usage at St. Louis, subsequent to O'Reilly's proclamation, appear in the archives in which many of the marriage contracts were deposited. An abstract of all the contracts there preserved has been prepared and is now submitted to the court. This abstract shows that from the accession of Piernas, up to the date of the contract in dispute, nineteen marriage contracts were entered into before Piernas and Cruzat. Of these, eleven adopt precisely the formula of the one in dispute, and six of the others bear plain marks of their origin in

the French law. Only six are in the Spanish language. Four of these are verbal translations of the French formula of the contract in dispute. Of the remaining two, one (that of Martin Duralde, the Spanish surveyer general), creates no conventional community, and the other (that of Sylvester Labadie), seems to have been prepared with an eye to both the Spanish and French law. It plainly, however, treats the French law as being at that time the prevailing system, for it carefully restricts, by express stipulation, the community to the acquets and gains made during the marriage.

It is manifest, from this abstract, that, in the matter of contracts, there was not as early as 1777 any adoption of the Spanish law at St. Louis; but, on the contrary, that, by consent of governors and governed, it was excluded.

The testimony of Brackenridge, the historian, is to the same purpose. In his history of Louisiana, p. 241, he says: "The Lieutenant Governor, who resided at St. Louis, was the commander of the militia, and had a general superintendence of the public works and property; but I do not know the exact extent of his powers. The laws of Spain were in force here, but it does not appear that any other had been in practice besides those relating to lands and the municipal arrangements. Laws regulating civil contracts are so intimately interwoven with the manners of a people, that it is no easy task to separate them. *Here, la coutume de Paris, the common law of the French colonies, was the system by which their contracts were governed.*" If, on the whole, it should be regarded as doubtful whether the Spanish or the French law was in force at the date of the contract in question, the presumption ought, in reason, to be in favor of the existence of such a state of things as would uphold the contract, rather than of such as would render it of no effect. And this presumption is much strengthened by the circumstance that the contract was executed in the chamber of the government, and in the presence of governor Cruzat, Judge Labuxiere and Mr. Perrault, gentlemen who understood

the true state of the law at that day much better than any of the present generation.

II. Taking it for granted now that the Spanish law was in force to its fullest extent at the date of the contract, it is to be considered whether there really be any rule in the Spanish law that renders the contract inoperative, so far as the defendants seek to give it effect. The matter must be determined in the same way as if the contract came to be judged in Madrid.

The law of the *Partidas*, cited in the opinion of the court, is admitted to do no more than lay down a rule of universal jurisprudence. The rule is acknowledged everywhere that laws have no extra-territorial operation. They are never admitted in another state as having any force *proprio vigore*.

Furthermore, it is conceded that the citizens of one state can not, by any form of agreement, introduce into it the laws of another state, *as laws*; in other words, to be obeyed, as expressing the will of a foreign sovereign. These principles belong to universal jurisprudence, for they flow of necessity from the nature of sovereignty and of government. But these principles fall far short of excluding a reference to foreign laws, when such reference becomes necessary to ascertain the meaning of a contract. The first duty of a court, in judging a contract, is to ascertain the intention of the parties, and the last to declare whether the ascertained intention be consistent with the law.

Manifestly the contract in question has but one meaning the world over. The rules of interpretation by which that meaning is to be arrived at are the same, whether those rules are applied by a French, Spanish, or American court. It becomes a different question when the lawfulness of the ascertained intention is inquired into. Here the local law is supreme, and all other laws have no effect.

The difficulty in the present case seems to arise from losing sight of the distinction between the instruments of evidence and the rules of law. The defendants do not appeal to the *custom of Paris* as furnishing the rule of law by which the validity of the contract is to be tested, but as supplying the means, and

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the only means by which the intention of the parties can be ascertained.

By the French and Spanish law, in all cases, and by the English law, with rare exceptions, parties to contracts are at liberty to adopt any forms of expression to signify their intentions. They may refer to any document, paper, law, statute, ordinance, custom or usage, domestic or foreign, and the thing thus referred to becomes a part of the contract, with the same effect as if its terms were incorporated into the contract in words. This is familiar learning.*

It is understood to be conceded in the opinion of the court, that if the parties had copied the words of the 229th article of the custom of Paris into their contract, these words would then have expressed an intention to which the Spanish law would have given effect. But it is manifest that, under the rule just mentioned, this has been in substance done by the apt words of reference contained in the contract.

Let it be supposed that the stipulation in the contract in question had been expressed in this form: "The said parties are to be one and common in all property, according to the terms of a certain parchment writing kept in the Châtelet at Paris, containing 362 articles, and entitled *La Coutume de la Prevote et Vicomte de Paris*." And suppose that the writing thus referred to had been produced in court: could it be made a serious question, whether the writing, with its 229th article, was to be taken as part of the contract? Would the whole effect of such a reference be destroyed as soon as it turned out that a people on the other side of the Atlantic had adopted that parchment writing as their public law?

It was held by the Supreme Court, in the case of Cutter v. Childress, admitted by the plaintiff's counsel in the argument of this case, and not now controverted in the opinion of the

* Such references, as is well known, are in constant use, not only in private agreements, but in the most solemn acts of state, in public statutes and in the entries of formal judgments of courts of justice. In the early legislation of Vermont, there were several instances in which the legislature adopted statutes of Connecticut by their titles only, declaring that they should be the law of Vermont *as they stood on the Connecticut law book*.

court, that by the words in the contract, "*the ancient custom established in this colony*," the parties pointed to the terms of that parchment writing just spoken of.

It is conceded on all hands that under the Spanish law the parties had the privilege of making their contract in the French language. From this simple privilege every thing that the defendants claim on this point, follows as a necessary consequence.

It is an established rule of interpretation that when technical words are used in an instrument, they must be construed according to the meaning which they have in the art or science from which they are borrowed. This rule is recognized by all courts, and is applicable to all languages.

Now the contract in question is full of these technical terms, borrowed from the French law. The words *conquets*, *douaire*, *prefix*, *preciput*, are of this description. To the ear of a judge of Spanish or English law alone, they are mere gibberish. By the light of the French law, their meaning is plain. He who, in expounding this contract, lays aside the French law as a sealed book, will put away the only interpreter by which the meaning of its terms can be known.

What is true of particular words may be predicated of clauses. Take the clause of *ameublissement*. In the light of the English law it has no sense. In the light of the Spanish law it is nugatory. With the aid of the French law, its meaning and force become apparent. As the clause is technical, the parties will be presumed to have used it in the sense which it has in the French law, from which it was borrowed.

But this rule of interpretation is not confined to words and clauses. It is applicable to the whole instrument. If, in taking up the marriage contract, and examining it as a whole, by its parts and its four corners, we recognize it as a formula devised under a particular jurisprudence to accomplish particular purposes, we must have recourse to that jurisprudence to learn the purposes to be accomplished, and in this way become acquainted with the real intention of the parties expressed in the contract.

The practical application of this rule of interpretation to the present case would result in this, as the expressed intention of the parties, that all the property of the parties to the marriage contract was carried into conjugal community in suchwise that on the dissolution of the community the property was to be divided between the survivor and heirs of the first deceased, by moieties. It is understood to be conceded, in the opinion of the court, that the parties intended by their contract to bring about this result; and that the result, when brought about by express contract, is repugnant to no rule of the Spanish law.

There are undoubtedly inconveniences attending the interpretation of contracts by reference to a foreign law with which our courts are not familiar, but these inconveniences fall mainly, if not entirely, upon the parties. As they have referred to that law as expressive of their intentions, they must show by evidence the terms of the law, just as they are required to produce any instrument or writing which, by like reference, they have made a part of their agreement.

In this connection, however, it is proper to remark that there is an inaccuracy in calling the custom of Paris a foreign law. Strictly speaking, it is a domestic law repealed. In 1770, it had been in force at this place, as part of the Illinois district, full three quarters of a century. Supposing it to be then repealed, it could not, in 1777, the date of the contract, be called a foreign law in any other sense than as our revised code of 1835 is now a foreign law. And it is conceived that our courts are bound to know and take notice of the custom of Paris in the same manner and to the same extent as of any other of our repealed codes. The parties, therefore, were not required to prove the custom of Paris as matter of fact on the trial.

The views that have been suggested, it is believed, are fully sustained by authority.

There has been a great variety of opinion among jurists as to the particular law that should govern the rights of property between husband and wife in cases where there was no marriage

contract. Some hold it to be the law of the matrimonial domicile, others of the future or actual domicile, and others still of the *situs* of the property. These different opinions are cited and commented upon by Story, Conf. Laws, 143, *et seq.* Where, however, a marriage contract has been entered into, there has been no diversity of opinion—all jurists agreeing that the contract is operative everywhere. (Story, 159, *ad finem.*)

It must be admitted, however, that the rule which gives effect to a marriage contract everywhere, does not meet the difficulty suggested in the opinion of the court. The objection in the case at bar is that the contract is invalid, because it refers to a foreign law, and therefore it can not be known what the contract is until the foreign law is known, and that is a sealed book. The objection is obviously one of mere form.

In France, before the revolution, a part of the provinces was governed by the civil law, and was called *pays du droit écrit*. The remainder of the provinces was governed by particular customs, and was called *pays coutumière*. In the customary provinces, with one exception, (Normandy,) conjugal community existed. In the provinces subject to the written law, a legal community did not exist, but, as in the Spanish law, it might be introduced by contract, and modified at the pleasure of the contracting parties. It was in like manner lawful for the parties to modify by contract the legal community existing in any of the customary provinces. (See Pothier, *Traite Com. article preliminaire.*) In this respect, therefore, France and Spain were equally liberal. Now, Ferriere, in his *Science des Notaires*, p. 364, has given the formula of a marriage contract by which parties, domiciled in a province of the written law, may adopt the rule of community prevailing at Paris. It is conceived in general terms, stipulating for a community, "*suivant et au desir de la communauté de Paris.*" The same writer, at page 373, gives a like general formula for the parties domiciled in Normandy, who may chose to adopt the custom of Paris. It is plain, from these examples, that the distinction between referring to a law by its name or title, and setting

forth its terms at large, is a subtlety that has altogether eluded the notice of French lawyers.

The English courts have dealt with this subject in a spirit of enlightened liberality, a striking example of which is furnished in the very recent case of *Duncan v. Cannon*, decided in the court of appeals during the last year. (31 Eng. Law and Eq. Rep. 443.) The case was this: A Scotch gentleman married an English lady in London. A marriage contract between the parties was executed at London, by the terms of which the husband was to have "a conjunct fee and life rent" in the property of the wife. The married couple went to Scotland to reside. In a few years they removed to England, where the husband embarked in business and subsequently became bankrupt. A controversy arose between the wife and the assignees in respect to the husband's rights in her property under the contract. There was no direct reference in the contract to the law of Scotland; but the master of the rolls laid hold of the circumstances that the contract was in Scotch form, and the husband had a Scotch domicil, as sufficient evidence of the intention of the parties in that respect. He accordingly received proof of the Scotch law and interpreted the contract by that law. From this decision there was an appeal; and the court above, without hearing argument for the appellees, affirmed the judgment. Lord Justice Bruce, in giving the opinion, said: "It was, I think, conceded at the bar, (but however this may have been, I consider it to be clear from the Scotch form, the expressions and the nature of the contract, and the husband's Scotch domicil at the time when he entered into it, a domicil which he does not appear at that time to have intended to change, and which continued at the time of the marriage,) that the contract must receive the same construction and produce the same effect as it would have received and produced if it had been prepared and signed in Scotland, if the domicil of the wife had then been in Scotland and the marriage had been solemnized in Scotland. The contract, therefore, must be construed by the law of Scotland or with reference to that law."

In another part of the same opinion, the learned Lord Justice said: "The expressions of this contract are expressions with which the English law is not familiar, which it does not indeed understand. They are foreign. It knows nothing of *conjunct fee* and *life rent*—nothing of an express provision for children, being no provision at all for children. The interpretation, coming as it must from Scotland, tells us the meaning of the terms used."

It will be observed that the doctrine of this case goes much farther than what is claimed by the defendants in the present case. There the judges went out of the contract to find the law by which it should be interpreted. In the present case, the parties have in the contract expressly furnished the rule of interpretation. There the judges declared that the validity of the contract must be tested by the foreign law. Here the parties are content that their contract, when ascertained, shall be judged by the domestic law.

The following cases, though not deciding the precise point now under consideration, serve to show the readiness with which English judges resort to foreign law, when such a reference is necessary, to learn the intention of contracting parties: *Faubert v. Turst*, 1 Bro. P. C. 129; *Anstruther v. Adair*, 2 Mylne & K. 513; *Este v. Smyth*, 18 Beav. 112; *Guepratte v. Young*, 4 De Gex & Smale, 217.

In the case of *Le Breton v. Miles*, (8 Paige, 262,) Chancellor Walworth, following the example of the English courts, had resort to a foreign law for the interpretation of a contract made by the parties in reference to that law. In that case it appeared that the parties, being domiciled in the state of New York, made a marriage contract reciting that they intended to remove to France, and declaring that "the law of community is the rule under which we understand ourselves as marrying." The contract was in the French language, but was executed in New York, and the marriage took place there. The parties never did in fact remove to France, and a controversy arose as to the effect of this contract on property in New York.

The chancellor held that it appeared by the recital that the parties contracted in reference to the law of France, and he took means to ascertain that law and gave effect to the contract accordingly. A superficial reader of the report of this case might suppose that effect was given to the contract because the parties expressed an intention of removing to France; but on a careful examination, it will become manifest that this circumstance is referred to only as showing what particular law of community was in the minds of the parties. The parties stipulated for a community, but they did not in terms declare whether it should be the community of the French, Spanish or Canadian law. There was a doubt as to the community intended. The expressed intention to remove to France solved the doubt. It is plain that the chancellor did not mean to say any thing quite so absurd as that two citizens of New York, by the mere recital of their intention to go abroad, acquired a privilege, above all other citizens, of violating the principles of universal jurisprudence. The case at bar is obviously much stronger than the one just quoted. The court has no need to grope about in search of a law by which to construe the contract. The parties have set down the rule for interpretation in plain words on the face of their agreement.

The courts of New York have, in other cases, freely referred to foreign law, where it became necessary to ascertain or effectuate the intention of contracting parties. (See *Decourche v. Savetier*, 3 J. C. R. 190; *De Barante v. Gott*, 6 Barb. 494; *Crosby v. Berger*, 3 Edward's Ch. R. 538.)

The case cited from Louisiana, (*Bourcier v. Lanuse*,) is not regarded by the defendants as really deciding any thing adverse to the doctrine for which they contend. On the contrary, it illustrates the very distinction on which they rely. In that case there was a marriage contract adopting the custom of Paris. An alienation of the community property was made by the husband in a form good by the custom of Paris, but invalid by the Spanish law as wanting the formalities required by that law. The court decided that an agreement to submit to the

custom of Paris could not dispense with the solemnities prescribed by the Spanish law in the alienation of property. The conclusion was correct. No one would suppose at the present day, under our law, that parties here could, by any form of agreement, dispense with the rules that a deed is requisite for the conveyance of real property, and that a privy examination of a married woman is necessary to render her conveyance effectual. The Louisiana judges did in truth no more than declare the maxim of universal jurisprudence, *locus regit actum*. It is perhaps superfluous to repeat that the defendants in the present case admit that the intentions of the parties to the contract, when ascertained, can be carried out only in the event that they are found to be consistent with the local law.

Diligent search has been made for an adjudged case, in which it has been held that a contract became inoperative because it referred to a foreign law. No such case has been found, and it is believed that none exists in the books.

It is well known that commercial contracts containing such references are of every day occurrence. Take the common case of a promissory note payable in a foreign currency; the value of such foreign currency can never be known without knowing the foreign law by which it is established. Take the case of an obligation for money with interest *after the rate allowed by the British law*. What shall be done? Shall the creditor have no interest at all, or shall the debtor be compelled to pay more than five per cent., which would be found to be the rate allowed by British law, if we were permitted to look into it? There would be no end of citing instances of the like kind occurring in the common business of life, but it is not deemed necessary to pursue the subject farther.

III. Supposing now that the Spanish law was in full force here at the date of the contract in question, and that parties by that law were prohibited from making any reference to a foreign law under pain of nullity, it is to be considered whether the contract in the present case can not be upholden on the ground that the custom of Paris became here, under the Span-

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ish rule, a valid local custom. In Spanish jurisprudence, custom was regarded as having all the force of an express law. The requisites to its validity are explained in 1st Partida, tit. 2, law 5. This law, in Moreau & Carlton's abridgement, is in these words: "By the people is understood all the inhabitants of any country or place, without distinction; and if all or a greater part of them observe any usage for a term of ten or twenty years, with the knowledge of the sovereign and without being opposed by him, such usage will have the force of custom, if during that time there had been pronounced two uncontradicted judgments conformably thereto; or a decision declaring the existence of such a custom, after it had been disputed. Usage, to have the force of custom, ought moreover to be reasonable, not contrary to the law of God, the empire or natural law; nor to have been established through error: for otherwise it would be an abuse, and could have no effect."

It might be supposed, from the terms of this law, that no custom was valid until two judgments were rendered in its favor, but such construction would be plainly absurd. Gregorio Lopez, the great commentator on the Partidas, in his 7th gloss on this law, says that the judgments mentioned in this law are put as examples of one kind of proof of the custom, and that others may be resorted to. His language is this: "*Si non sit iste modus probandi sed alius, ex quo colligi possit tacitus consensus populi, non excluditur per istam legem. Illud enim, quod inducit consuetudinem, est usus et mores populi; non ergo debet arctari ad sententias tantum. Ostendit igitur ista lex unum modum inducendi et probandi consuetudinem, et per hoc non alios excludit.*"

White gives an extract from the *Manual del Abogado* that fairly expresses the Spanish law in this particular: "Custom is unwritten law that has been introduced by use. In order to be such and not vicious, it is required that the usage be that of the people or the greater part of them for the space of ten years, and that it be in harmony with the general utility. Two uniform judgments or sentences are one of the proofs of cus-

tom. A legitimate custom has the force of law; derogates the former law that is contrary to it, and interprets the doubtful law; from whence it is said that there is a custom beyond the law, contrary to the law, and according to the law." (1 White, 360.) Eseriche, in his Dictionary of Jurisprudence, says: "Custom is either general or special; general when it is observed throughout the whole kingdom — special when it is observed in some particular district. We must not confound custom with usage; usage is no more than a fact, custom is a law; there may be usage without custom, but there can be no custom without usage to accompany or precede it: usage consists in the repetition of acts, and custom arises out of this repetition. The usage leading to a custom may be proved by public writings, by the testimony of distinguished and ancient persons of the country, or by two concurring judgments upon the matter to which it relates." (Eseriche, Dicc. voc. Costumbre. See also Recopilacion de leyes de las Indias, lib. 2, tit. 1, law 4, in 2 White, 25.)

It will be seen that the requisites of a good local custom under the Spanish law, are that it shall have been used by the greater part of the people for the space of at least ten years; that it should have been approved or at least acquiesced in by the public authorities, and that it should not be immoral or unreasonable. Let us test THE ANCIENT CUSTOM by these rules.

When the Spanish officers superseded the French authorities in the district of Illinois, in 1770, they found there a population entirely French, and acquainted with no other system of municipal law than the custom of Paris, which had been in use from the time of the first settlements, about four-score years before. The abstract of the marriage contracts in the hands of the court, shows that up to this date there were sixteen marriage contracts entered into at this place, which were deposited in the archives, and still remain there. Fifteen of these created a community in express terms, according to the custom of Paris (*suiwant et au desir de la coutume de Paris*). The other does not

name the custom expressly, but it contains the clause of *ameublissement*, and is thoroughly French in its character.

During the first ten years of the Spanish government, under the administration of the royal governors, Piernas, Cruzat and Leyba, there were twenty-eight marriage contracts entered into that still remain in the archives. The custom of Paris is not mentioned in any of them by name, but, with only two exceptions, they plainly refer to it by apt words of description, such as *the ancient custom, customary law, &c.* No less than nineteen adopt the precise language of the contract now in question. There are two that clearly do not adopt the custom. The one says nothing on the subject of community, and the other expressly adopts the *Recopilacion* of Castile. It is not deemed important to examine the abstract farther, although it will be found that the same old custom is generally adopted in the marriage contracts made during the Spanish rule, and the last, in point of date, that is found in the archives, was entered into before Stoddard, the American commandant, and is an exact copy of the formula of the contract now in question.

Confining our attention to the first ten years of the Spanish administration, as being the term fixed by the Spanish law for the ripening of an usage into a custom, it is found that more than eleven-twelfths of the marriage contracts then executed adopt the custom of Paris. This happened with the concurrence of the sovereign, for the royal officers set their hands to every one of them. The end accomplished was not repugnant to the law of God, to the public utility, or to the dictates of right reason. The case then, at all points, falls in the category of a valid local custom, under the Spanish law.

We need not be surprised at this result. The same result was brought about in another way in the other part of the French possessions in America. When the English received Canada from the French in 1764, under the treaty of cession, their first act was to extend the English law over the country by act of parliament, couched in terms less dubious than those of O'Reilly's proclamation. The Canadian French were disgusted with

the change ; they remonstrated against it ; they persisted in petitioning the king and the parliament, until at the end of ten years the English government restored the custom of Paris under the name of the "Custom of Canada." This custom remains to the present day the basis of the jurisprudence of Lower Canada.

It is curious to mark the working of national pride and jealousy in these transactions. The English, as we have just seen, restored the custom of Paris to Canada, but took care to give it a new name. In a like temper, the Spanish government permitted the people of the Illinois district to make their contracts according to the custom of Paris ; but, that the national dignity might not be compromised by the mention of the capital of a rival power, *la coutume de Paris* was turned into *l'ancienne coutume*.

IV. It only remains to consider the effect of the circumstance that the contract in question was entered into before the royal governor, and was sanctioned by the official signature of that officer.

We see that the parties intended to adopt the community established by the custom of Paris. The governor advised them that the intention was lawful ; and he drew up the contract in a form to effectuate that intention. After a lapse of well nigh eighty years, we are told that the governor did not understand his business ; that he ought to have written out the 229th article of the custom of Paris in words at length, instead of referring to it by words of description ; in short, that the contract is bad in point of form. The contract is not invalid by reason of any immorality or unreasonableness in its terms, but because it trenches on the sovereignty of his Catholic majesty by a broad allusion to a law of his most Christian majesty.

It has just been assumed that governor Cruzat informed the parties that their intention to adopt the custom of Paris was legal. This is implied from the circumstances. Neither party could read or write. In Spanish practice, formal instruments

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were to be drawn up by or under the supervision of some public officer. It was the duty of the officer to explain to illiterate parties the legal effect of its particular clauses, and the officer himself was amenable to severe penalties if he inserted any stipulation that was contrary to the laws. (1 Febrero, 177; 3 id. 417.)

Beyond all question the contract is to have the same effect now that it had when entered into. If Labuxiere and Roussel, the subscribing witnesses and brothers-in-law of Vifvarenne, had, on the death of the latter, in 1781, set up the pretension that is now brought forward by a party claiming under them, the matter would then have been judged by Cruzat, the officer before whom the contract was made. There is no difficulty in conjecturing what would have been the result. It is not denied that this court may correct the errors of governor Cruzat; but the function is a very delicate one, and ought not to be exercised, save in a case clear beyond all doubt.

The Supreme Court of the United States, in speaking of the acts of the Spanish governors, holds this language: "No principle can be better established by the authority of this court, than that the acts of an officer, to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power. The principles on which it rests are believed to be too deeply founded in law and reason ever to be successfully assailed." (Strother v. Lucas, 12 Pet. 437, and many cases there cited.)

Under the Spanish constitution of government the power of making and dispensing with the laws was vested in the king; and the power might be delegated to another at the royal pleasure. The 12th law of the 1st Partida, in the Latin version of Gregorio Lopez, says: "Imperator aut Rex in dominio suo, *vel alius ejus mandato*, potest legem condere super temporalibus." The power of modifying the general laws of the kingdom, so as to suit the condition of the distant colonies, was undoubtedly delegated to the royal governors. Upon no other

principle can the proclamations of O'Reilly, of Unzaga, of Carondelet, of Gayoso, be upholden.

White, in his *Recopilacion*, (vol. 1, p. 367,) has given extracts from Solorzano's work on the political government of the Indies under Spain. They serve to show the large powers conferred on the Spanish governors; a portion of these extracts is here transcribed:

"Subjects have no obligation to investigate or know the orders and instructions of a secret nature which are given to the viceroys, in which bounds are put to their power, for if they do not obey them, they are subject to reprehension and punishment; but what they may perform must be sustained, because they are in quality of factors or substitutes to royalty, for whose actions he who named them is accountable as having put them in that charge, which is indeed conformable to right. *

* * But this, as I said, proceeds with reference to common law, and it is fit that the viceroys and governors of the Indies never cease to bear it in mind; still, as regards the municipal duties of these, the whole, or almost the whole, is left to their discretion and prudence. * * *

The provinces of the Indies, being as they are so distant from Spain, it became necessary in these more than in any other, our powerful kings should place these images of their own, who should represent them to the life and efficaciously. * * *

What I reckon as certain is, that the person to whom there is the greatest likeness is to the kings themselves who appoint them and send them out. * * *

From which it happens that regularly in the provinces entrusted to them, and in every case and in all things which are not especially excepted, they possess and exercise the same power, authority and jurisdiction with the king who names them. *

* * And all this is very right; for wherever the representation of another is given, there the true copy of that other is given; and, in general, this representation is more resplendent when the viceroys and magistrates are further removed from the masters who influence and communicate it to them—as Plutarch finely expresses it by the example of the moon, which

becomes of greater size and splendor in proportion as she removes from the sun, which is the object that gives her that splendor. * * * Much greater pains are required with viceroys for the new world, which is so much further distant from the eyes of their kings, and is composed of so many different nations and mixtures of people, and comprehends so many new provinces, in which every day there occur some new and unthought of affairs—where mutiny and sedition are contemplated—where sudden and dangerous changes are experienced—where municipal laws are not known or not found sufficient for every case; *and if we wish to make use of the Roman code or the Castilian, these do not square with those of the country*; and the very state of the republic is so inconstant, varied and different in itself every day, that things which yesterday might be judged and considered very straight and regular, to-day would become unjust and pernicious. * * * The first established rule and sentence is that viceroys can act and dispatch in the provinces of their government, in cases that have not been specially excepted, all that the prince who named them might or could do if he were himself present. * * * All which is indeed conformable to the purpose for which these honorable and preëminent employments were instituted, which was, as it appears, that subjects, who live and reside in such remote provinces, may not be obliged to go and seek the king who lives so far off; that they may have near them a substitute of his, to whom they can apply; with whom and of whom they can treat. The lawyer Ulpiano dares to say, in an absolute style, ‘that there is no case in the provinces which can not be dispatched by them;’ and the same doctrine and many examples to confirm it are taught to us by many other texts of law, civil, canonical and royal. * * * Even when they exceed their powers or secret institutions, they must be obeyed like the king himself, although they transgress and are afterwards punished for it.”

It is impossible to read the foregoing extracts from Solorzano and doubt the ample authority of governor Cruzat to give

full validity to the contract in question, although it might not be strictly conformable to the general laws of the kingdom.

Some observations will now be submitted on the separate opinion of one member of the court to the effect that property *ameubli*, according to the custom of Paris, was subject to the law of second marriages, and therefore the result would be the same under the facts of the case, whether the rights of the parties were determined by the French or Spanish law.

1. The law of second marriages is in its nature penal, and it is supposed that the French penal laws were out of use here in 1792, when Genevieve Cardinal, the twice married woman, died, and the rights of the children, under the law of second marriages, attached.

2. It is thought to be not altogether clear that the law of second marriages ever had any force in the French colonies. The Supreme Court of Louisiana has forestalled this inquiry only as to the Spanish law. The law is in its nature wholly unfitted for an infant colony.

3. The law was no part of the custom of Paris. It was introduced into the kingdom by an edict of Francis I., A. D. 1560. The 279th article of the custom of Paris created certain disabilities in the wife marrying a second time, but that article has no bearing on the rights of the present parties.

4. By the edict of Francis I., the widow marrying a second time was required to reserve for the children of the former bed her interest in the excess of the first husband's contributions to the community above her own. The language of Pothier on the subject is this: "L'avantage, qui résulte à une femme de ce que son défunt mari a apporté de plus qu'elle à la communauté, paraît aussi, lorsqu'elle l'a acceptée, être un avantage sujet au second chef de l'édit, pour la moitié de ce qu'il a apporté de plus qu'elle." (*Traité du Mariage*, 607.)

Applying the rule as stated by Pothier, it would be necessary to take an account exhibiting the value of what was brought to the community by the husband and wife respectively. Surely such an account can not be taken in this action of ejectment.

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5. In another particular the French law of second nuptials was more favorable to the wife than the Spanish law. By the former law she was not required to reserve what came to her by succession from a child of the former marriage. Pothier, after stating the changes in the civil law, in this respect, says: "Nous n'avons pas admis, en pays coutumier, cette réserve des biens, auxquelles la femme, qui a convolé en secondes nocces, a succédé à quelqu'un de ses enfans du premier mariage; quoiqu'ils viennent du premier mari par le canal de cet enfant, elle ne les tient point de son premier mari: elle ne les tient point de son premier mariage; le titre de succession, auquel ils lui sont échus, est un titre tout différent." (*Traite du Mariage*, 609.)

6. Under the construction of the territorial law of descents, adopted by the court, it is of no importance to the present parties whether the Spanish or French law of second marriages was in force here. But it may turn out to be of great importance whether the property in dispute went into the community according to the one law or the other. In truth it may so happen that one quarter part at least of this highly valuable estate may fall to the one or the other party, as this question may ultimately come to be decided by the court.

R. M. FIELD,
of Counsel for Appellants.

PACIFIC RAILROAD, Defendant in Error, v. HUGHES, Plaintiff
in Error.

1. The acceptance by the Pacific Railroad of the act of March 1, 1851, amendatory of its original charter, did not discharge one, who had previously made a subscription to the capital stock of said company, from his obligation to pay calls regularly made upon such subscription; nor did the act of December 25, 1852, (Sess. Acts, 1853, p. 10,) in so far as it fixed the location of the Pacific Railroad. (*Renshaw v. Pacific Railroad*, 18 Mo. 210, affirmed.)

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2. When legislative changes in a charter of incorporation of a railroad are such as consist only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute what may be considered as substantially the original object of its creation, one who has previously subscribed to the stock of said railroad company can not set up such changes as a defence at law to an action for calls upon such subscription of stock. The remedy, if any, is in equity.

Error to St. Louis Court of Common Pleas.

This was an action brought by the Pacific Railroad to recover calls made upon a subscription of ten shares of stock of plaintiff taken by defendant, Hughes. The action is founded on the sixth section of the original act of incorporation, approved March 12, 1849. (Sess. Acts, 1849, p. 220.) Defendant's subscription was made February 8, 1850. The defence relied on was that subsequent acts of the legislature, to-wit, that approved March 1, 1851, (Sess. Acts, 1851, p. 268,) and those approved December 25, 1852, (Sess. Acts, 1853, p. 10, 363)—being amendatory of the original charter, and having been accepted by plaintiff without the consent of defendant, had effected such changes in said charter as to discharge the defendant from his obligation to pay subsequent calls upon his subscription of stock.

The seventh section of the original act of incorporation, (Sess. Acts, 1849, p. 219,) gave to the Pacific Railroad "full power to survey, mark, locate and construct a railroad from the city of St. Louis to the city of Jefferson, and thence to some point in the western line of Van Buren county (now Cass county) in this state, with a view that the same may be hereafter continued westwardly to the Pacific ocean."

By the ninth section of the amendatory act of March 1st, 1851, the seventh section of the original charter was repealed, and power was given to the company "to survey, mark out, locate and construct a railroad from the Mississippi river, or any other point in the city of St. Louis, on any route the said company may deem most advantageous, to any point on the western line of this state which the said company may select."

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By the fourth section of this act, the seventh section of the general act concerning corporations (R. C. 1845, p. 230), which provides that "the charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal in the discretion of the legislature," which was left in full force, as respects plaintiff, by the original act of incorporation, was abrogated as respects said plaintiff.

By the eleventh section of an act approved December 25, 1852, (Sess. Acts, p. 12,) it was provided that "the Pacific railroad shall be deemed a railroad beginning in the city of St. Louis, and running westwardly by the way of Jefferson city, and thence along the best and most practicable inland route through the county of Johnson, and terminating at any point in Jackson county which may be designated by the said company, any thing contained in the charter thereof to the contrary notwithstanding." By the second section of this act it was provided that "the Pacific Railroad may lay out, construct and maintain a line of railway or branch railroad, with a single or double track, from any point on the main line of the Pacific railroad east of the Osage river, to any point on the western boundary of this state, south of the Osage river, which the said corporation may select," &c. The tenth section of this act is as follows: "The said company shall keep separate accounts of the cost of surveying, locating, constructing, maintaining, altering and operating said southwestern branch railroad, and also of the earnings thereof, and may, if the board of directors shall deem it advisable, create a new stock for said branch, and shall apply the same, as well as the proceeds of the lands due to said south-western branch, and the proceeds of the bonds authorized by the ninth section of this act, exclusively to the construction of said south-western branch, and pay the dividends declared from the nett profits of said branch to those who shall become stockholders therein, or their legal representatives, according to their respective shares."

By section first of another act of the general assembly, ap-

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proved December 25, 1852, (Sess. Acts, 1853, p. 363,) power was given to the Pacific Railroad company "to extend and construct a branch railroad from any point on the main trunk line or the south-west line, not nearer than twenty miles of St. Louis, to the Iron Mountain, in St. François county, and Pilot Knob, in Madison county, and may extend the same to the Mississippi river, and also to the boundary line of the state of Arkansas;" "and the said company shall keep separate accounts of the operations of said branch road, including the cost of construction, and the earnings thereof, and shall make dividends of its nett earnings among the stockholders in said branch and the Pacific railroad," &c.

The finding of the facts by the court is as follows: "That the defendant subscribed to ten shares of the capital stock of the plaintiff, and agreed to pay the calls as charged in the petition; that the various calls set out in the petition were duly made, and that the defendant failed and refused to pay the several calls which the petition charges he failed and refused to pay; that the several acts of the general assembly stated in the answer were passed amending the charter of said plaintiff subsequent to said subscriptions by the defendant, and that the defendant did not consent to any of said amendatory acts; that the board of directors of the plaintiff and a majority of the stockholders assented to and accepted said amendments to the charter, and the plaintiff is acting under said amendments. The south-west branch, authorized to be constructed by the act of the general assembly, has been surveyed and located, and the costs of surveying and locating the same, amounting to \$40,000, has been paid out of the general funds of the plaintiff. Said branch begins to diverge from the main road at a point about forty miles from St. Louis, and said branch is about 181 miles long. The plaintiff has held no election to obtain the consent of the stockholders to build said branch out of the common stock, and it has not yet been determined whether the said branch shall be built by the creations of separate stock or out of the common stock. A contract has been

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made by the plaintiff for the construction of the said branch, and the work done with reference to said branch has been paid for, thus far, out of the common funds of the plaintiff. Some stock has been subscribed separately for said branches, but nothing has as yet been paid on said stock subscriptions, nor has any of the lands ceded to the plaintiff, for the construction of said branch, been sold. The plaintiff keeps distinct accounts for said branch—accounts entirely distinct from the accounts for the construction of the main road. The said south-western branch is to cost between eight or nine millions of dollars. The plaintiff caused surveys to be made for about sixty miles for the Iron Mountain branch, and paid the expenses thereof. The plaintiff has relinquished the said Iron Mountain branch. The amount of calls due from the defendant to the plaintiff, on defendant's subscription, was, at the commencement of this suit, two hundred dollars; that the interest on said calls, from the times they were respectively due, amounts to thirty-one dollars. Thereupon, the court declares that the plaintiff is entitled to recover the sum of two hundred and thirty-one dollars and costs." Judgment was accordingly given for that sum.

Dayton and Buckner, for plaintiff in error. 1. At the time of defendant's subscription of stock the general assembly had power, under the 7th section of the general act concerning corporations, to alter or modify or amend any charter of incorporation, even against or without the consent of the stockholder. (*Renshaw v. Pacific Railroad*, 18 Mo. 210.) By the amendatory act of March 1, 1851, this power was abandoned as respects the Pacific railroad. After the passage of this act the general assembly could not make any essential change in the charter of plaintiff, without its consent; nor could the consent of the corporation, or a majority of the stockholders, to such a change, bind any stockholder refusing to ratify the amendatory act. 2. The act of December 25, 1852, worked a thorough and essential change in plaintiff's powers. It was in fact a new charter. It is no answer to this to say that the company was authorized to keep separate accounts between the main trunk

road and the branch road, and could also have a separate and distinct stock. The same company had the construction of both roads, and the mere authority given to the company to determine whether five hundred miles of railroad, instead of two hundred and fifty, should be constructed, and eighteen millions of dollars instead of half that sum expended, was such a change in the contract of defendant as to abrogate it entirely. It has not yet been determined whether new stock shall be issued or not, as authorized by the act of December 25, 1852. All expenses for both roads have, as yet, been paid out of a common fund. 3. Defendant contracted to pay a certain sum towards the construction of one road in this state. He can not rightfully be required, under that agreement, to contribute towards building two roads, with different interests, extending double the distance, and costing twice as much money.

Glover & Richardson and *T. T. Gantt*, for defendant in error. 1. The construction of the south-west branch was not to be a burden on the stockholders of the Pacific railroad unless it should be so agreed. This was never done. The case stands thus. The same trustees stand charged with the execution of two separate and different offices. To this there can be no legal objection. The burden of constructing the south-west branch was never assumed either on separate or joint account. There was then no enlargement of the powers, duties or burdens of the Pacific railroad company. 2. It must be shown that the Pacific railroad company has legally bound itself to appropriate defendant's money to build the south-west branch, or he has no just cause of complaint. 3. The fact that the company may have expended money illegally in making the surveys of the Iron Mountain railroad, and the south-west branch, will not discharge the defendant from his liability to pay his subscription. 4. The act of December 25, 1852, was either void or not void. If not void, if it was competent for the legislature to pass an act operative, *proprio vigore*, on the old subscribers, there is an end of the case. If void, then the law has no effect, and every old subscriber may have his remedy, if the

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company misapply or attempt to misapply the funds receivable for the original undertaking. Should the misapplication have occurred, the directors are liable for a breach of their trust; should it be attempted or contemplated, the remedy is by injunction. 5. The act of 1852 is not obligatory on the company without its acceptance. This acceptance can be made effectually only in one way; by convening the stockholders and taking the sense of them on the point of acceptance or rejection. This does not appear ever to have been done. Nor does it appear that there has been any certificate of such acceptance filed in the office of the secretary of state, within six months of December 25, 1852. This being so, the act of that date is void, and, so far as the company has been assuming to act under it, their acts have no legal sanction; but this does not discharge subscribers. (See sec. 15 of Act of December 25.)

LEONARD, Judge, delivered the opinion of the court.

After the company was incorporated, Mr. Hughes subscribed for the stock, for the calls upon which this suit is instituted. The remedy, by personal action, is given by the 6th section of the charter, which authorizes the company to make calls for the payment of the capital stock as they may deem proper; "and if any stockholder shall fail to pay any such requisition within ten days after the time appointed, to recover the same with interest; and if not collected, the company may declare the stock forfeited and sell the same." Subsequently, the amendatory act of 1st March, 1851, and the two amendatory acts of 25th December, 1852, were passed and accepted by the company; but the defendant, not having assented to them, insists that the effect of them is, *ipso facto*, as a matter of law, to discharge him from his obligation to pay the subsequent calls upon his stock, and this is the question we are now called upon to settle.

When an unincorporated joint stock company is formed, the rights of the partners, not only as between themselves individually, but also between each member and the whole body of the

subscribers, are usually settled by the articles of association or a deed of settlement. These articles, constituting the association, and regulating not only the powers of the majority, but also the rights of each stockholder, are the constitution of the society, and of course can not be changed without the consent of every member; and therefore, if the company attempt to appropriate the funds to a purpose not authorized by the articles, or assume powers not conferred by the constitution of the company, the law will protect the minority by an injunction or a decree for a dissolution of the company, and an account and distribution of its effects, as the character of the act complained of may require.

And it may be that the same law ought to prevail when a mere private company, charged with no public duties, and acting alone with a view to the interests of its members, acts under a charter of incorporation, upon the principle that the charter then stands as the constitution of the society in lieu of articles of association, and regulates the rights and duties both of the company and the stockholders, pursuant to their mutual agreement. Accordingly, there are cases in the books of proceedings against incorporated joint stock companies, by individual members, to restrain the company from misapplying the corporate funds; and this relief may be extended even to a dissolution of the society, and an account and distribution of its effects, if the case require it, upon the same principles that similar relief is administered in ordinary partnerships.

But it must be observed that there is an admitted distinction between a company acting under mere articles of association and one acting under a charter of incorporation, in reference to the control of the majority over the constitution of the company. In the one case the articles are inviolable in every particular, no matter how minute, unless a power to alter is expressly given to the company; in the other, as the law authorizes the government to change the charter, with the assent of the majority, it may be said that there is an implied assent on the part of each stockholder to all such changes. It is insisted, how-

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ever, that this implied assent does not extend to such fundamental changes as make the amended charter an entirely different enterprise; changing, for instance, a charter for a canal into one for a railroad or a charter for a road; to accommodate one line of travel, into one for a road for the accommodation of an entirely different line; nor to changes that materially alter the constitution of the society, or greatly enlarge its powers.

In England, however, where private property is, perhaps, as well protected as in our own country, no such limitation appears to be recognized in reference to this implied assent of all the stockholders to future changes in the constitution of the company, made by the government, with the consent of a majority of its members. Accordingly, Lord Brougham, in *Ware v. Grand Junct. Wat. Co.*, (2 Russ. & Mylne, 470,) refused to restrain a railroad company from applying to parliament for an enlargement of its powers and for fundamental changes in its constitution, upon the ground that it was the right of the company to procure these changes, if they desired them; and that all who became stockholders, did so with their eyes open to this power of the majority over the constitution of the society. We remark here, too, that a distinction seems to exist in the English courts between mere private corporations, acting exclusively for the benefit of their members, as banking and other similar companies, and railroad companies, that must be considered as acting partly with a view to the public interest, in consideration of which they obtain from the government the right of taking compulsorily the land of private individuals for the use of the road. (*Ffooks v. The Lond. & S. W. Railroad Co.*, 19 Eng. Law & Eq. Rep. 11.)

But, however all this may be, and recognizing for the purposes of the present case the right of each stockholder to resist fundamental changes in the charter to his injury and against his consent, it seems to us that the American cases that have allowed this matter to be set up at law, as a defence to a suit for calls upon stock taken, have not been very well considered, are without any precedent in the English courts, are

not warranted upon just legal principles, and can not be carried out in practice without infinite mischief, not only to the public interests involved in all great works of this character, but also to the private rights of the other members of the company. If the dissenting member is released at law by the mere effect of these fundamental changes, it is because they have of themselves broken up, without any judicial sentence to that effect, the original association, on account of the inability or unfitness of the corporation, as now constituted, to execute the original purposes of the association. It is very evident, however, that whenever this question is to be discussed and settled, there are other parties interested in it besides the complaining stockholders and the corporate body. The members of this company have agreed with one another to construct a railroad out of a joint fund, to which each has contributed in proportion to the share he is to have in the work when completed; and it is not and ought not to be in the power of any one or more of the partners, at pleasure, to break up this undertaking by withdrawing the fund already advanced; or, which is the same thing, by withholding what he has agreed to contribute; nor ought the courts of justice, by their judgments, to produce this result, unless in a case proper for such relief, and in which all the interests to be affected are represented before the court. Whether, however, the alleged changes in the constitution of this company, procured, or at least assented to by a majority of the company, are of such a character as to warrant the interference of the courts at the instance of a dissenting stockholder, by injunction against a probable misapplication of the funds, or by a decree for a dissolution of the original association, on account of the unfitness or inability of the corporation, as now constituted under the amended charter, to execute the original purpose of the partners, need not be now determined. In the view we take of the case, it is enough—yielding to this stockholder all the rights that he would have in a private joint stock company, acting under voluntary articles of association—without any power in the company to change the objects of as-

sociation, or alter, in the least, the constitution of the society—that his remedy for a wrong of the character of the present one, is a suit in equity, in which all the parties in the matter to be litigated may be heard, and complete justice done to all upon the final determination of the case. And to this view of the subject we incline, notwithstanding some of the American cases to which we have been referred hold quite a different doctrine, and allow fundamental changes in a charter to be used by a stockholder as a defence at law against subsequent calls upon stock previously subscribed, but with considerable difference of opinion as to the character and extent of the changes necessary to produce this result.

In reference to this defence at law, we remark, that the only cases we have found in which the relief was actually granted upon the ground suggested, are, *The Union Lock & Canal Co. v. Towne*, 1 N. H. 44; *Hartford & N. H. Railroad v. Croswell*, 5 Hill, 385; and *Winter v. The Musco. R. Co.*, 11 Geor. 451; although, in the cases of *Indiana & Ebensburg Turnp. Co. v. Phillips*, 2 Penn. Rep. 184; *Penn. & Ohio Can. Co. v. Webb*, 9 Ohio, 139; *Barrett v. Sangamon & Alton Railroad*, 13 Illinois, 505, and *Green. & Col. R. Co. v. Coleman*, 5 Rich. 140, the general doctrine is recognized upon the authority of previous cases in Massachusetts, New Hampshire and New York, but not applied on account of the character of the charges made.

In the New Hampshire and New York cases, the stockholders were discharged at law from the calls upon their stock, because the legislature had subsequently increased the power of the company, in one case, authorizing it to purchase a hundred instead of six acres of land; and in the other, allowing it to run a line of steamboats from the termination of their road; and in Georgia, the original termination of the road was changed to a new point, fifty miles short of it, and in a different direction. These are, it is believed, the first cases in which this doctrine was put in practice, and the authorities referred to for it are two cases from Massachusetts, *Mid. Turnp.*

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Co. v. Locke, 8 Mass. 268, and Med. Turnp. Co. v. Swan, 10 Mass. 384 ; a case from New York, Livingston v. Lyneh, 4 John. Ch. Rep. 573, and the case from Pennsylvania, of Ind. and Eben. Turnp. Co. v. Phillips, 2 Penn. 184.

A careful examination of the Massachusetts cases, to which all the others refer, will show, it is believed, that they contain no such doctrine as that applied in the cases that cite them as authority. The only question in them was, whether the company could recover upon an express collateral promise of the stockholder to pay calls ; and while it was holden that it could not, because, under the circumstances attending the promise, it could not be considered as made to the company, it was at the same time admitted that the party was a member of the company as then constituted, and liable as such to all the remedies provided by the charter in respect to calls upon stock subscribers.

The case from Johnson's Ch. Reps. was a suit in equity, and the decree of the chancellor establishes that in a *private* joint stock company the majority can not change the constitution of the society as established by its members, without the consent of every one ; and how the case of the Ind. and Ebensb. Turnp. Co. v. Phillips is now considered in Pennsylvania, is shown by the subsequent cases, already referred to, of Irwin v. Turnp. Co., and Gray v. The Monongahela Nav. Co.

The English cases referred to in the briefs, we think, afford no countenance to the doctrine here insisted upon. We remark, however, that there is a manifest distinction between the Georgia case and the cases from New Hampshire and New York. In the former, assuming that there had been a substantial legislative change in the termination of the road, so that it was quite a different enterprise from that originally contemplated, the plaintiff's right to recover further calls might be repelled upon the ground that, as the company had no power, as now constituted, under the amended charter, to build the road originally designed, it ought not to be allowed, even at law, to collect funds that it could not lawfully use ; but, in the other case, the

objection is not that the funds, if used at all, must be misapplied, but that, as the company is now authorized to do other things, it may misapply them, or, at least, that it is now so changed in its constitution, that it is an unfit agency to be trusted with the application of the funds originally contributed, and should, therefore, be deprived of all control over them.

We are disposed to think that, in both classes of cases, the better and safer remedy for all persons interested would be a direct proceeding in equity, in which all the necessary parties could be brought before the court; but, without determining this now, we are satisfied that when the changes are of the character last indicated, consisting only of an increase of corporate powers, or of a different organization of the corporate body, leaving it, with lawful power, to execute what may be considered as substantially the original work, the party can not be relieved at law in a suit for calls upon his stock.

We proceed, therefore, to an examination of the changes here complained of. They are, in the termination of the road, and in the additional powers conferred upon the company, not only to build branches, but also to issue new stock, and thereby lessen the relative power of the stockholders.

The original charter was for a "road from the city of St. Louis to the city of Jefferson, thence to some point in the western line of Van Buren (now Cass) county, in this state, with a view to its continuation westward to the Pacific ocean." The amendment of March 1st, 1851, was from the same beginning, "on any route the company may deem most advantageous to any point in the western line of this state, which the said company may select;" and the act of 25th December, 1852, provided that the road, beginning at the same beginning, should run "westwardly by way of Jefferson city, and thence along the best and most practicable inland route through the county of Johnson, terminating at any point in Jackson county which may be designated by the company."

In *Irwin v. The Turnp. Co.*, (2 Penn. & Watt's Rep. 470,) it was held that a change in the intermediate points of a road

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would not release the stockholders from the calls ; and in the Penn. and Ohio Can. Co. v. Webb, (9 Ohio, 139,) it was remarked by the court, even in reference to changes in the terminative points : " It is not every minute change which will absolve a subscriber from his engagements. In works of this kind, some power of regulation is retained by the legislature—some discretion is confided to agents who execute the details. When the subscription is general, uncombined with conditions, perhaps the stockholder has no reason to complain of any line of transit which starts from the same point of business, accommodates the same line of travel, and substantially subserves the same general interests." The only objection, however, that could be taken here, in reference to the legislative change in the position of the road, is to that made by the act of 1st March, 1851 ; but it was decided here, in the Pacific Railroad v. Renshaw, (18 Mo. 210,) that that change did not release the stock subscribers, and there is no pretence for insisting that the subsequent change in the location of the road, made by the act of 25th December, 1852, had that effect. That act only designated one of the many routes that it was competent for the company to select under the act of March, 1851, and by accepting the amendment of 1852, and thereby selecting the route there indicated, the company only exercised the power of selection they had under the act of March, 1851.

In reference to the other amendments, it is seen that they do not put it out of the power of the company to apply the fund to the purpose for which it was subscribed, and therefore these changes, under the view we have taken of the law, constitute no defence in this action.

If the company are about to misapply the funds to the injury of any stockholder, his redress is by a direct proceeding to restrain such misapplication ; and if the company can not now be safely trusted with the funds, on account of the changes in its constitution, or if it *has* conducted or is *now* so conducting the affairs of the stockholders as to show that a continuation of the association can not result in effecting its original purpose,

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and the stockholders, in a public corporation of this character, are entitled to the same relief to which they are entitled against a private joint stock company, (about which we refrain from expressing any opinion,) the remedy is a direct proceeding to which all the associates are made parties, either individually or by representation, and where proper relief can be administered to the complaining party, according to the exigency of the case, and consistently with the rights of others.

The result is, Judge Ryland concurring, that the judgment must be affirmed.

SCOTT, Judge. The question involved in this case seems to be well settled in the American courts. That a material alteration in the charter of a corporation, which is its fundamental law, will discharge a stockholder from future liability for calls on his subscription, previously made, when the alteration is effected without his consent, stands on principles of law long recognized, and founded in justice. I do not find that there is any contrariety of opinion on the subject. Courts have differed as to the extent of the change in a charter which will produce this consequence, but all of them unite in sanctioning the general rule. Although a stockholder is a member of the corporate body, yet there is an individual contract between him and that body which is defined by the terms of the charter existing at the time of his subscription. He agrees to pay his money for a specified purpose, and for that alone, and on no principle of law or justice can the corporation, without his consent, change the purpose to which he agrees it shall be applied and yet compel its payment. A payment coerced under such circumstances, would be arbitrary and tyrannical and abhorrent to all our notions of the sanctity of contracts. It is no answer that the stockholder was aware that a majority of the corporation could apply for and obtain from the legislature a change of its powers and objects. The legislature may change the charter, but it has no power to vary the contract of the stockholder against his consent. If a corporation will, against

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the wishes of its stockholders, obtain a material change of its fundamental law, it must be content to lose the subscriptions which had been previously made. It is for the interest of corporations that such should be the law. What prudent man would invest his money in an enterprise which he has well considered and deemed profitable, if, at any moment afterwards, a majority of those with whom he is associated may change the character of the enterprise and compel him to pay his money in an adventure which his judgment condemns and which he sees would end in ruin?

As this is a matter of some moment at this time, it may be as well to refer to some of the cases which have been decided in relation to it. As far as I have examined, they are of one tenor. In the case of the Middlesex Turnpike Cor. v. Locke, (8 Mass. 268,) it was determined that where the directors of a turnpike corporation, with the assent of the corporation, procured an act of the legislature, altering the course of the turnpike road, one who, before such alteration, had subscribed for a share and had expressly promised to pay all assessments, was held not to be answerable in an action for the assessments. The court said the plaintiffs rely on an express contract, and they are bound to prove it, as they allege it. Here the proof is of an agreement to pay assessments for making a turnpike in a certain specified direction, and of the making a turnpike in a different direction. The defendant may truly say, *non hæc in fœdera veni*. He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto. Much fraud might be put in practice under a contrary decision. The same doctrine is maintained by the same court in the subsequent case of the Middlesex Turnpike Corporation v. Swan, (11 Mass. 393.) In the case of the Hartford & New Haven Railroad Co. v. Croswell, (5 Hill, 383,) the Supreme Court of New York held that, if a corporation procure an alteration to be made in its charter, by which a new and different business is superadded to that originally contemplated, such of the

stockholders as do not assent to the alteration will be absolved from liability on their subscriptions to the capital stock, especially if the alteration be one plainly prejudicial to their interests. In this case, the court remarked: "It is most obvious, if incorporated companies can succeed in establishing this sort of absolute control over the original contract, entered into with them by the several corporators, there is no limit to which it may not be carried, short of that which defines the boundary of legislative authority. The proposition is too monstrous to be entertained for a moment. Corporations possess no such power. The original charter is the fundamental law of the association, the constitution which prescribes limits to the directors, officers and agents of the company not only, but to the action of the corporate body itself, and no radical change or alteration can be made or allowed by which new and additional objects are to be accomplished, or responsibilities incurred by the company so as to bind the individuals composing it, without their assent." In *New Hampshire, in the case of the Proprietors of the Union Locks & Canals v. Towne*, (1 New Hamp. 44,) it was determined where an individual had contracted to take a share in a corporation created for the purpose of making a river navigable, and empowered to hold real estate not exceeding six acres, and to collect a toll forty years, not exceeding twelve per cent. per annum on the amount of money expended, and afterwards, the legislature, upon the petition of the corporation, but without the assent of the individual, authorized them to hold real estate to the amount of one hundred acres, and to collect a toll unlimited as to its amount and duration, that the individual was discharged from his contract and not liable for any subsequent assessment on the share. The court observed, the opinion being delivered by Judge Woodbury, "that, to make a valid change in this private contract, as in any other, the assent of both parties is indispensable. The corporation, on one part, can assent by a vote of the majority; the individual on the other part, by his own personal act. However the corporation then may be bound by the as-

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sent to the additional acts, this defendant, in his individual capacity, having never consented to either of them, is under no obligation to the plaintiffs except what he incurred by becoming a member under the first act. Consequently, the assessments sued for, if raised to advance objects essentially different from those originally contemplated, are not made in conformity to the defendant's special contract with the corporation; and this action, sustainable on that contract alone, cannot be supported." In Georgia, in the case of *Winter v. The Muscogee Railway Co.* (11 Ga. 450,) it was decided that, "where a charter was granted to build a railroad between certain points, and the defendant subscribed for shares of stock, and afterwards the charter was amended by changing one of the termini of the road, running it in a direction different from that contemplated by the original charter, the defendant was released from the payment of his subscription, as he had not consented to the alteration." The court said "that corporations can exercise no power over the corporators beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement and consent. That, although alterations may be made in the charter of an incorporated company, in furtherance of the designs and objects of the company, yet in all such cases due regard must always be had to the inviolability of private contracts. The original contract of the parties can not be materially or essentially altered by an amended charter, so as to bind subscribers thereto without their assent." The doctrine maintained in this opinion is recognized in Illinois, in the case of *Barret v. The Alton & Sangamon Railroad Co.*, (13 Ills., 508.) On this question similar views are expressed by the court of Ohio, in the case of *The Penn. & Ohio Can. Co. v. Webb*, (9 Ohio, 136); also by the court in Vermont, in the case of *Stephens v. Rutland & Burlington Railroad Co.*, reported in *Wharton's Law Register* for January, 1853. The court in Pennsylvania, in the case of *the Turn. Co. v. Phillips*, (2 Penn. & Watts, 194,) maintain the same doctrine; nor do I conceive that there is any thing inconsistent

with the principle therein declared in the subsequent case, in the same book, of *Irwin v. The Turnpike Co.*, 470.

I do not understand that the law in England, in relation to this question, is different from that maintained in the courts of the United States. This may be inferred from the cases of the *Midland Great West. Railway Co. v. Gordon*, (16 Meeson & Wellsby, 803,) and *Davis v. Hawkins*, (3 M. & Sel. 488.) I do not consider that the case of *Ware v. The Grand Junction Water Works Co.*, (2 Rus. & Mylne, 470,) contains any thing at variance with the principle above stated. That was no action on a contract. The law applicable to contracts had nothing to do with it. That was an application by the stockholders to a court of Chancery to restrain the corporation from applying to parliament for an enlargement of its powers. Corporations may undoubtedly apply to the legislature for an extension of their powers, but they must take the consequence of such extension when it materially and essentially varies the purposes and objects of the original charter. What redress is it to a party if he is compelled to pay his money in the first instance, and then to apply to a court for an injunction to restrain its improper application? If collected, it can not be applied to the original purposes of the corporation, for they are materially changed; and so if the company is restrained, it must lie idle in its hands, and if so, it should not be received, as in equity and justice it ought to be returned to the stockholder, as it can not be used for the purpose for which it was agreed to be paid.

In my opinion, the change in the charter was of such a character as justified the subscriber in withholding the payment of his calls, and therefore the judgment should be reversed.

SPECK, Appellant, v. WOHLIEN AND WOLFF, Respondents.

1. Whenever by the rules of equity a party is entitled to have a right to land vested in him, the remedy may be had, in St. Louis county, in the Land Court.
2. Where a sale of real estate of a decedent has been made under an order of the probate court for the payment of the debts of said intestate's estate upon a petition of the administrators, and the sale has been approved by said court, but the administrators have refused to make a deed of the land sold; *held*, that a court of equity can not compel the administrators to make a deed to the purchaser, nor can it, by its decree, vest the title to the land in said purchaser.
3. Where a sale of real estate of a decedent for the payment of debts is approved by the probate court at the same term during which the sale takes place, the heir, not having notice of such approval, so that he is deprived of his appeal, may call in question such approval in a suit brought against him by the purchaser for a divestiture of title.

Error to St. Louis Land Court.

This was a suit instituted by Ann C. Speck, against L. Rudolph Wohlien as the only heir of Diedrick W. Wohlien, and also of Anna Wohlien, his wife, and against John Wolff, as the surviving administrator of the said Diedrick W. Wohlien. Plaintiff, in her petition, prayed that the title to a certain lot, situate in the St. Louis common, might be vested in her, the said plaintiff.

The facts, as they appeared in proof on the trial, are as follows: The city of St. Louis, by deed dated May 22d, 1842, demised to Diedrick W. Wohlien lot No. 5, in block No. 14, of the St. Louis common, containing 3 57-100 acres, at an annual rent of \$45 52; that being five per cent. upon the amount bid (\$910 35) for said lot by him at a public sale. Wohlien had the privilege of at any time paying the amount of his bid, and upon so doing would have been entitled to receive a fee simple deed from the city. At the end of fifty years from the sale, and at the end of every fifty years thereafter, the lot was to be valued, and the said Wohlien was to pay as a yearly rent thereafter five per cent. upon such valuation.

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The said D. W. Wohlien died about August 18th, 1842, leaving the respondent, L. Rudolph Wohlien, his only heir. His widow, Anna Wohlien, and the respondent, John Wolff, administered on his estate. At the December term, 1844, of the St. Louis Probate Court, said administrators presented their petition for the sale of so much of the real estate of their intestate as would pay the remaining debts due from his estate. Afterwards, all the steps required by law having been duly taken, said court, at its March term, 1845, ordered the real estate of the deceased, mentioned in the said petition, and as a part thereof the above described lot, to be sold on the first Monday of June, at the succeeding June term of said court. Said lot was duly appraised and was valued "at the sum of \$1500 for the fee of the same, the purchase price of the same—\$910 35—being yet due to the city, which is included."

On the day appointed in the order, to-wit, June 2d, 1845, all the requisites of the law having been complied with, all the right, title and interest of the intestate, in and to the lot in controversy, was duly exposed for sale. It was fully made known and explained to the bidders and others present at the sale, that there was due to the city on said lot the sum of \$910 35, that being the amount of the bid made by the intestate, on which the annual interest, at five per cent., amounting to \$45 52, was payable to the city in lieu of rent; that the annual interest, \$45 52, for the year ending May 2d, 1845, was still due to the city and unpaid; that these sums would have to be paid by the purchaser. At this sale, the said Anna Wohlien, one of the administrators, being the highest and best bidder, became the purchaser of said lot, it being stricken off to her at the price and sum of \$420. The said administrators made a report of this sale to the probate court, June 6th, 1845, and on the same day said sale was approved by said court.

It was in evidence that in the settlement of said administrators with the probate court, at its September term, 1846, among the items of debit against their intestate's estate there

was the following: "Interest to city on real estate from May 2d, 1844, to May 2d, 1845, No. 2, \$47 32."

It was also in evidence that the sum bid by the said Anna Wohlien, to-wit, \$420, was duly paid by her; that the rent or interest due the city was paid by her, January 7th, 1846; that if the said rent was charged by said administrators against the estate of their intestate, it was a mistake; that a final settlement of the estate of the said Diedrich W. Wohlien was made March 25th, 1848, and the administrators were discharged.

No deed was ever made by the said Wolff to his co-administratrix, the said Anna Wohlien, although the same was demanded soon after the sale by the said Anna. A deed from the said Wolff, joined in by herself, as administratrix, was also demanded, but none was ever made.

In the year 1846, after the said sale, the said Anna Wohlien executed a deed of relinquishment to the city of St. Louis of said lot, and received in return from the city a conveyance in fee simple of the same. She afterwards, on the 16th of January, 1846, sold and conveyed the said lot to the appellant, Ann C. Speck. She died in 1849, leaving the respondent, L. Rudolph Wohlien, her only heir at law.

The court below decided that it had no jurisdiction to order or decree a conveyance of the lot in controversy by either of the defendants, L. R. Wohlien and J. Wolff; nor to vest in plaintiff, by its own decree, any right, title or interest which the said D. W. Wohlien had in said lot. Thereupon, plaintiff took a nonsuit, with leave to move to set the same aside, and a motion to that effect having been made and overruled, the case is brought here by appeal.

T. Polk, for appellant. 1. The Land Court had jurisdiction of this case, and had power to give the relief prayed for. (Sess. Acts, 1853, p. 90; Code of Practice, art. I, § 1 and 2, and art. II, § 1; R. C. 1845, p. 38-50, 634, 330, 331; *Overton v. McFarland*, 15 Mo. 315; *Miller v. Woodward*, 8 Mo. 171; 9 Mo. 339; R. C. 1835, p. 156; 15 Mo. 225; 1

Story Eq. 529.) 2. The Land Court then having jurisdiction, the plaintiff is entitled to the relief sought. The sale of the lot in controversy was made after all the requisites of the law had been complied with, and having been approved by the court, Anna Wohlien, the purchaser, was entitled to have the title to the lot in question vested in her, and her co-administrator ought to have made her a deed conveying the same to her. He is the proper person to make the deed. (R. C. 1835, p. 53, § 22; Sess. Acts, 1851, p. 210, § 2.) But the question is not so much who ought to make the deed, as has appellant a right to the land. She clearly has. The heir and distributee has therefore been made a party. If it be maintained that the power of the administrator to make a deed is a statutory power, and that therefore the Land Court can not interfere with it, it is answered that this is not a case of a defective execution of a power. The execution of the power has here been carried to a certain point, and then stopped without cause and against right. The object of this suit is to have the execution carried forward and completed. The purchaser has done all on her part that she was required to do. In the case of *Moreau v. Detchmندی*, 18 Mo. 522, there was a *defective* execution of a statutory power. The same is true of the case of *Bright v. Boyd*, 1 Sto. 486. (See *Chance on Powers*, 54, 543; *Alexander v. Merry*, 9 Mo. 514.) 3. If it be objected that the land in controversy did not sell for three-fourths of its appraised value, and that therefore the sale was improperly approved, it is answered that the approval by the probate court of said sale has settled that question forever. Whether the court ought to have approved of the sale can not be inquired into collaterally, as in this case. (See 4 Wend. 436; 12 id. 533; 8 Metcalf, 361; 2 Raw. 287; 2 Penn. 321; 8 Verm. 368; 11 S. & R. 422; 10 Pet. 473; 2 How. 319; 2 Pet. 169; 16 Mo. 21; 19 Mo. 96, 621.) The lot was however sold at three-fourths of the appraised value. 4. The objection that the report of the sale ought to have been made by the administrators to the next September term of the probate court, and not to the same

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June term during which the land was sold, is answered by saying that this is a matter that can not be reached collaterally in this suit. It could be reached only by appeal. (R. C. 1845, p. 106 ; 2 Verm. 253 ; 2 Green's Ch. R. 147 ; 16 Mo. 9.) Wolff, the co-administrator, could have enforced the sale against Mrs. Wohlien in a court of equity, by a bill for specific performance. (2 Green's Ch. R. 156-165 ; 2 Sto. Eq. p. 87 ; 6 Wheat. 528.)

Field and Gibson, for respondents.*

SCOTT, Judge, delivered the opinion of the court.

As to the question whether the Land Court has jurisdiction to afford the relief asked by the plaintiff, we are of opinion that if a case had been made which would have warranted the equitable relief sought by the plaintiff, the Land Court would have been the proper tribunal to hear and determine the cause. We understand that wherever, by the rules of equity, a party is entitled to have a right to land vested in him, the remedy may be had in the Land Court. It is a mistake to suppose that the mere fact of a final settlement of an estate having been made in the county court, of itself gives a party a claim to relief that he would not otherwise have. Where estates have been settled and distribution made, this court has allowed one having a claim against an estate to come into equity for relief in the first instance, making the personal representatives, heirs and distributees parties, without having his demand first established in a court of law or county court. The Land Court has no-jurisdiction of this case in the same sense that no other would have had jurisdiction, because the plaintiff did not show herself entitled to the relief she sought in the way in which it was asserted.

When Wohlien, the father, died, the lot in dispute descended to his son, one of the defendants. Instead of suing the heir

* There is no brief on file on the part of respondents, and therefore it is not attempted to set forth the line of argument pursued.

or devisee, our law gives a power to the administrator or executor to sell the lands of a deceased person for the payment of his debts by conforming to the regulations prescribed by the statute. To this proceeding the heir is no party except so far as he pleases to make himself one, though he is bound by it when the regular legal steps have been taken to divest his estate. Now an order is made for the sale of a decedent's land for the payment of his debts. For some reason or other the party purchasing under the order of sale fails to obtain a title to the land he purchased. On what principle can the purchaser call on the heir to perfect his title? What is the difference between the heir and the debtor in an execution? May not the heir say that he has had nothing to do with the matter; that no act of his had been an inducement to the purchaser; that the law allowing a sale of his inheritance prescribes a way by which the purchaser may obtain a deed; he has therefore no right to call upon him for aid, as by no act or demand of his was the purchaser in the situation of which he complains. There is a large class of cases in which third persons are vested with a power to sell the lands of others, and it is no easy matter to distinguish, in principle, this case from any other of that class. An affirmance of the right to relief in this case would, in effect, overthrow the principle that courts of equity will not relieve against a defective execution of a legal or statutory power—a consequence which no one can contemplate without being struck with the inconvenience which may follow from it. The case of *Bright v. Boyd*, (1 Story's Rep. 478,) is in point on this subject, and that, too, was the case of a sale of land by an administrator. The giving of a bond was a necessary prerequisite to a sale, and the administrator failed to give one. It was held that the omission, whether accidental or not, could not be treated as a mistake or accident remediable in a court of equity; that courts of equity, while they afford relief against a defective execution of a power executed by a private person, yet they can not afford relief against the defective execution of a power created by law, nor dispense with all the ne-

cessary formalities. The same principle is recognized in the case of *Moreau v. Detchemendy*, (18 Mo. 522,) and applied to a deed executed by a sheriff. In this last case, the instrument was inoperative for want of a seal. There can be no substantial difference between a void instrument which has a mere physical existence and no deed at all. The case of *Pottinger v. Pottinger*, 2 Green. (N. J.) 157, merely shows that an administrator may enforce a contract made to purchase land at his sale under an order of court. Because courts of equity will not enforce the specific performance of a contract unless there is a mutuality of remedy between them, therefore it is argued that chancery would enforce the contract against the heir. But this does not follow. The mutuality would be confined to the administrator and purchaser, and would not extend to the heir, who had nothing to do with the contract between them. This is said in answer to the argument resting on this case, and is not intended to sanction the law of it. We do not consider that the case of the *Heirs of Pratte v. the Heirs of McCullough*, (1 McLean's R. 69,) though conflicting with those above cited, as sustaining the plaintiff in her claim to relief. In the case referred to, it would seem that the executor, who alone could make the deed, was dead, and that, perhaps, was the inducement to the opinion, though there seems to be some distinction taken between a defective execution of a power and a defective power, without distinguishing between powers created by law and those deriving their existence from the acts of individuals. The point determined in that case is not in this, and we will express no opinion in relation to it. The petition of the plaintiff states that there is a person in existence from whom she is entitled to a deed, and it does not appear that he has refused it.

The distinction between the case under consideration and that of *Frye v. Kimball*, (16 Mo.) and similar cases, is obvious. It is one thing to sustain an ancient deed, on which the rights of property repose, against objections which may be urged for its overthrow, and another thing to make a deed, or pass a title

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when the same objections are urged as reason why the deed should not be executed or the title pass in the first instance. Deeds every day are sustained against objections, which, if they had been urged as a reason why the deed should not have been executed, would have prevailed.

It is maintained that the approval of the sale can not be questioned in a collateral proceeding. Had the approval been made at the term required by law, there might have been some weight in this proposition. The party affected could then have taken his appeal. But the objection here is, that the approval was made at a time when he was not in court and not required to be there; and as the appeal must be taken at the term at which the approval was made, the party not having notice, and not being present, could not take his appeal. It was held by this court, in the case of *Caldwell v. Lockridge*, (9 Mo. 358,) and the principle has since been repeatedly recognized, that where an attempt is made to affect a person by a proceeding to which he was no party and of which he had no notice, and from which, therefore, he could not appeal, he may, in a collateral proceeding, treat it as a nullity. In suggesting these considerations respecting the approval, as it now stands before us for our sanction prospectively, we do not wish to be understood as expressing our opinion as to such an approval, already acted upon and consummated in a deed. As before observed, the distinction between the cases is glaring.

We will not undertake to determine whether the defect in the approval may not yet be remedied by the probate court on notice to all those interested, and whether a remedy may not be had otherwise than by a proceeding in the nature of a bill in equity, which we do not think is adapted to obtain the end sought for by the plaintiff.

Judge Ryland concurring, the judgment is affirmed.

THE STATE, Respondent, v. ALLEN, Appellant.

1. Where a justice of the peace is indicted for misdemeanor in office, it is not necessary that the prosecutor's name should be endorsed on the indictment.
2. Whether a justice of the peace, in improperly issuing a warrant for the arrest of an individual, did the same *maliciously*, is a question for the jury.

Appeal from St. Louis Criminal Court.

The defendant, Allen, a justice of the peace, was indicted for misdemeanor in office, in maliciously and without just cause issuing a warrant for the arrest of one Myers. No one's name was endorsed on the indictment as prosecutor. It is not necessary to set forth the instructions given by the court. The question of malice was put to the jury very fairly and favorably to defendant.

U. Wright, for appellant.

H. A. Clover, for the State.

SCOTT, Judge, delivered the opinion of the court.

We see no error in this record. There was no necessity for a prosecutor. This was an indictment for a misdemeanor in office. The 22d section of the 3d article of the act concerning "Practice and Proceedings in Criminal Cases," prescribes that no indictment for any trespass against the person or property of another, not amounting to felony, or for the first offence of petit larceny, shall be preferred, unless the name of a prosecutor is endorsed thereon, as such. If the offence of which the defendant is accused is a trespass, it will be difficult to specify one in the code which may not be termed a trespass. That an individual may have been unjustly oppressed by the crime, does not the less make it a misdemeanor in office? The offence for which a prosecutor is required, is to be determined from the face of the indictment and not from the evidence on the trial.

As to the error assigned, that a new trial was refused, we may remark that there is nothing in this. Whether there was

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malice in the accused or not, was a question for the jury; and they having found the fact, and the court below having refused a new trial, on no ground can we interfere.

The other judges concur, and the judgment is affirmed.

THE STATE, Respondent, v. McQUAIG, Appellant.

1. Where, under an indictment under section 38, of article 2, of the act concerning crimes and punishments, (R. C. 1845, p. 351,) the jury render a verdict against the defendant, and assess his punishment at \$300; *held*, that it is not erroneous to enter a fine of \$500 against the defendant.

Appeal from St. Louis Criminal Court.

H. A. Clover, for the State.

RYLAND, Judge, delivered the opinion of the court.

The defendant, McQuaig, was indicted for "feloniously and wilfully assaulting George Little, in St. Louis county, and with a certain knife, feloniously and wilfully, by his act and procurement, did strike, wound and cut and stab the said George Little on the twentieth day of August, in the year 1854, at St. Louis county, giving to him, the said George Little, then there, with the knife aforesaid, in and upon the right arm, and near the shoulder of him, said George Little, one wound of the length of two inches, and the depth of two inches; and the jurors aforesaid, upon their oath aforesaid, do say that said George Little, then and there, in manner and form aforesaid, was wounded, disfigured, and did receive great bodily harm, by the felonious act of him, the said Malcolm McQuaig, against the peace and dignity of the state." This is the substance of the third count in the indictment. The first count charges the assault and the stabbing to have been made by the defendant, "feloniously, wilfully, on purpose, and of his malice aforethought, with the intent, maliciously, &c., to kill the said George Lit-

tle." The second count omits the malice, but charges the act to have been done "feloniously and wilfully, with the intent to kill." The defendant pleaded "not guilty," was tried and found guilty in manner and form as charged in the third count of the indictment, and the jury assessed his punishment to a fine of \$300.

The defendant moved for a new trial, "because the verdict was against law, against evidence, and against the weight of evidence; because the verdict is against the instructions of the court, and is against the provisions of the statute regulating the punishment for the offence charged in the third count of the indictment."

The court overruled this motion, and sentenced the defendant to pay the lowest fine allowed by law for the offence charged in the third count, which is the sum of \$500. The fine assessed by the jury being lower than the lowest amount allowed by the statute for such an offence, viz., \$300, the court disregarded so much of the verdict and put the fine to the lowest sum which the statute allows. The defendant prayed an appeal to this court.

The statute regulating practice and proceedings in criminal cases, art. 7, § 5, says: "If the jury assess a punishment, whether of imprisonment or fine, below the limit prescribed by law for the offence of which the defendant is convicted, the court shall pronounce sentence and render judgment according to lowest limit prescribed by law in such case." This section of the statute sanctions the act of the court, and makes it the duty of the court to treat the illegal fine as a blank, and fill it with the punishment at the lowest limit prescribed by the act for the offence. The offence of the defendant, as charged in the third count of the indictment, (that being the count under which he was convicted,) when punished by fine alone, has its minimum fixed at five hundred dollars. The punishment may be "by imprisonment in the state penitentiary not exceeding five years, or in a county jail not less than six months, or by fine not less than five hundred dollars, or by both fine not less than one hun-

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dred dollars and imprisonment in a county jail not less than three months." (38th section, 3d article, crimes and punishments, R. C. 1845, p. 351.) The third count of the indictment is founded on this section.

The record does not show that any exceptions were taken to the admission of any evidence, or to the instructions given by the court to the jury, and the motion for a new trial shows us the causes only complained of here. There is no weight in any of the reasons assigned for a new trial, when compared with the record, and upon the whole case, this court is of opinion that the judgment should be affirmed, which is done accordingly; the other judges concurring.

THE STATE, Respondent, v. WEBER, Appellant.

1. The separation of a jury, in a criminal case, (an indictment for an assault with intent to kill,) after having written down and sealed their verdict and delivered the same to the officer in charge of them, though without consent and without the order of court, is not such misconduct as will authorize the Supreme Court to reverse and remand the cause.
2. Where, after a prisoner has announced himself ready for trial, and a witness for the prosecution has been examined in chief—all the witnesses for the prosecution having been sworn—it is discovered that the prisoner has never been formally arraigned, and by order of court he is then arraigned and pleads not guilty, and objects to any further proceeding in the cause, asking that he may be discharged; *held*, 1st, that it is not erroneous, to so cause him to be arraigned; 2d, that it is not erroneous, the jury being re-sworn, to proceed to examine the witnesses for the prosecution, without causing them to be re-sworn.

Appeal from St. Louis Criminal Court.

The facts sufficiently appear in the opinion of the court.

Kribben and *Jecko* for appellant. 1. The court below erred in arraigning the defendant after the jury had been empannelled and sworn, and the trial had been proceeded with; and the discharging of the jury, without their rendering a verdict after the

defendant had been put upon his trial under a charge of felony, is tantamount to an acquittal. That an arraignment is necessary, see 1 Chitty Crim. Law, 418; 2 Hale, 216, 218; 3 Mod. 265; 1 Show. 131; Com. Dig. tit. Indictment, M.; Hale's P. C. 293. It was erroneous to permit the same jury to be sworn after the arraignment, and after they had heard the evidence of the prosecuting witness. So also to permit the witnesses for the prosecution to be examined without being re-sworn. Up to the arraignment, the proceedings were illegal. 2. The separation of the jury, under the circumstances, is error. (1 Chit. Crim. Law, 634; Duncombe, 201; 8 Mo. 154; 3 Just. 160; T. Raym. 183; 4 Bla. Com. 380.)

H. A. Clover, for the State, cited the following authorities: 8 Ohio, 480; 11 id. 474; 13 id. 492; 15 id.; 82; 8 Mo. 158, 166.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for an assault with the intent to kill one Frederick Kolb. The indictment contained three counts; the first count charged the assault and stabbing to have been done by the defendant, with malice aforethought, with intent to kill. The second count with stabbing, with intent to kill; the same as the first count, leaving out the charge of malice. The third count charges that the defendant feloniously and wilfully, and by his act and procurement, did strike, stab, penetrate and cut the said Kolb, giving to him one wound, of the length of one inch, and of the depth of four inches; charging that the said Frederick Kolb was then and there in manner and form aforesaid, wounded, and did receive great bodily harm by the felonious act of him, the said George Weber.

There was a trial and verdict of guilty, under the third count, and punishment assessed to six months' imprisonment in the county jail and five hundred dollars fine. A motion for a new trial was made and overruled, and an appeal taken to this court.

The bill of exceptions shows that when the case was called,

the State, by her circuit attorney, and the defendant, who was personally present with his counsel, declaring themselves ready for trial, a jury was lawfully empanelled to try the same. After the trial had progressed and the State had examined in chief the first witness, it was discovered that the defendant had not been formally arraigned. Thereupon the court ordered that the defendant should be formally arraigned, which was done accordingly; and thereupon the defendant pleaded not guilty. The court then asked the defendant if he was ready to proceed with his trial immediately, to which he answered, "as ready as he was before." The defendant did not wish to be understood as waiving any advantage the alleged illegality of the proceedings may allow him. He insisted upon all his legal rights in the premises, and protested against any further proceedings in the case against him, and moved that he be discharged from the offence and go hence without day. The court overruled this motion, and the defendant excepted. The jury were thereupon re-sworn to try the issue, and the witness re-examined in chief, and passed over to the defendant for cross-examination. The bill of exceptions, in one part, asserts that after the jury were sworn the first time, and before any testimony was given, all the witnesses for the State were duly sworn, but were not re-sworn; yet the same bill of exceptions, when each witness is introduced, asserts that the witness "having been sworn, testified" as follows. The same entry is made in regard to the defendant's witnesses. Sometimes the word "duly" is inserted before the word sworn; thus, "having been duly sworn." The objection appears at the time to have been made by the defendant, and, for aught that appears, the witnesses were properly sworn; at least the record may be so considered. The party complaining must show by his bill of exceptions, beyond doubt, what he complains of, to be an act of the court on the record, and not leave it a matter for this court to decide, whether the thing be so or not—not leave it in doubt.

The bill of exceptions also shows that the jury, after they had retired to consider of their verdict, and were in charge of

an officer of the court, the court having adjourned over until the next day, did agree on their verdict, and did write down and seal it, and deliver it to the marshal to be kept, and then, without an order of the court or the consent of any one of the parties, did disperse until the hour of meeting of the court in the morning, when they again met in court; and the marshal, in their presence, handed over their verdict to the clerk, and it was read and received as their verdict by the court.

These various matters are alleged by the court for the defendant, in this court, as grounds for reversal of the judgment of the criminal court.

So far as regards the dispersing of the jury, after making up their verdict, sealing it and delivering it to the officer who had charge of them, and then separating until next morning and meeting in court to render their verdict, this act alone will not be regarded as any sufficient reason for setting the verdict aside. The mere dispersing of the jury is not enough to authorize the court to disregard their verdict. This point has been often ruled thus by this court. In two cases, decided at Jefferson city by this court at last term, (*State v. Harlow*, and *State v. Igo*, 21 Mo. 446 and 459,) the same doctrine is held. But if there be any reason to believe that the jurors, or any of them, have been tampered with, or improperly influenced, or any wrong means have been exerted over them, in consequence of their thus dispersing, in any manner so as to influence their verdict, then it should be set aside at once. But there is nothing of that character intimated here. There is, then, no ground for reversal, so far as this point extends.

There is nothing in the point of the swearing of witnesses. The state of the record will not justify this court in reversing for this cause, even if it were a good cause when it sufficiently appears upon the record. The defendant and his counsel saw these witnesses sworn; they knew they were sworn in his case to testify. Had the slightest intimation been made against their testifying, it could, and out of abundant caution might, have been obviated. But the record shows that the witnesses were sworn.

Upon the subject of arraignment we see no error. The formal arraignment and entering of the plea of not guilty, and the re-swearing of the jury, put the matter beyond cavil. In looking over the whole record, I have been unable to find any act of the court which is calculated to affect, injuriously, the defendant. There is no great necessity of the formal reading of the indictment to the prisoner, while he stands with uplifted hand, gazed at by the crowd; when he appears and enters his plea of not guilty, the trial might proceed without any unnecessary formula of olden times being insisted upon. The principal cause of the arraignment is to identify the prisoner; and when he appears and pleads to the indictment, what cause is there for arraigning him? The instructions were numerous enough to have error in them, being spread over six pages of the record; yet I find the law, in the main, correctly laid down. The jury might have had some trouble in comprehending the great mass of it laid before them, yet there is no reason to believe they were misled by it.

Since the doctrine of arraignment has been maintained, I will state my views upon it somewhat more at length. The term arraignment means the calling of the defendant to the bar of the court to answer the accusation contained in the indictment. (2 Lord Hale's Pleas of the Crown, p. 216.) *Arraigne* is *ad rationem ponere*, to call to account or answer. Lord Hale says that arraignment consists of three things: "First, the calling the prisoner to the bar by his name, and commanding him to hold up his right hand, which, though it may seem a trifling circumstance, yet it is of importance, for, by holding up his hand, *constat de personâ indictati*, and he owns himself to be of that name; second, reading the indictment distinctly to him in English, that he may understand his charge; third, demanding of him whether he be guilty or not guilty, and if he pleads not guilty, the clerk joins issue with him, *cul. prist*, and enters the prisoner's plea, then demands how he will be tried; the common answer is, "by God and the country," and thereupon the clerk enters *po. se.*, and prays to God to send

him a good deliverance." Now we find it is not necessary to go through the ceremony of holding up the hand in the case of a peer ; nor is it absolutely necessary in the case of a common person, it being sufficient that it appears to the court who is the person indicted. (Lord Delamere's case, *State Trials*, vol. 4, p. 211, and Lord Mohun's case, *State Trials*, same vol., p. 508.) Now all that is mentioned as the third ingredient of an arraignment is never put upon the record in our courts ; nor is it necessary to ask the prisoner how he will be tried. His plea of not guilty must, as a matter of course, be tried by a jury. In our country, the trial by battel was never recognized nor allowed, hence it never became necessary to ask the prisoner how he would be tried ; there was but one way to try his guilt or innocence—that was by a jury. He could not say "by God." Judge Story says, in order to ascertain why this inquiry, that is, "How will you be tried?" is made ; it is necessary to state that, anciently, in England, the party accused had his choice of being tried in one of two ways, by battel or by jury. If he chose the trial by battel, he was accustomed to say he would be tried by God ; if by a jury, that he would be tried by the country. (*United States v. Gibert et al.*, 2 Sumn. 68.) The trial by battel now in England is abolished, but the form of arraignment continued. Judge Story says, in all these states of the Union, where the constitution provides that the trial shall be by jury, and the prisoner pleads not guilty, it seems to him to be a mere mockery to ask him how he will be tried, for the constitution has already declared how it shall be. He continues : "But, be this as it may under the state governments, I am clearly of opinion, that the form is wholly unnecessary, under the constitution and laws of the United States, in the federal courts. The constitution has already declared, "that the trial of all claims, except in cases of impeachment, shall be by jury. It is imperative upon the courts, and prisoners can be lawfully tried in no other manner. As soon, therefore, as it judicially appears of record that the party has pleaded not guilty, there is an issue in a criminal case which the courts are

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bound to try by a jury." (United States v. Gilbert, *et al.*, 2 Sumn. 69.) Our statute declares that "all issues of fact, in any criminal case, shall be tried by a jury." It also declares that "it shall not be necessary, when any person shall be arraigned upon any indictment, to ask him how he will be tried, and if he deny the charge in any form, or require a trial, or if he refuse to plead or answer, and in all cases when he does not confess the indictment to be true, a plea of not guilty shall be entered, and the same proceedings shall be had, in all respects, as if he had formally pleaded not guilty to such indictment." (Prac. in Criminal Cases, art. 5, sec. 5.) Now I hold it all sufficient, if a defendant, when called to answer an indictment, says he is not guilty. The clerk should enter such plea, and the trial might thereupon proceed. If the defendant wished to hear the indictment read, then it should be read to him before he is called to plead.

Upon the whole record in this case, we think the judgment should be affirmed. Let it therefore be affirmed; the other judges concurring.



THE STATE, Respondent, v. WIEDNER, Appellant.

1. Case affirmed, because no exceptions were taken to the action of the court, and no bill of exceptions filed and allowed.

Appeal from St. Louis Criminal Court.

H. A. Clover, for the State.

LEONARD, Judge. The appellant has not furnished us a brief. We have, however, examined the record and find no error in it. No exceptions were taken at the trial and preserved in the record, and of course what occurred there can not be reviewed here.

THE STATE, Appellant, v. ROWE, Respondent.

1. An appeal on the part of the State can not be taken in a criminal case, where judgment has been given for the defendant on a demurrer to a plea to the indictment. This is not a case within the 10th section of article 8 of act to regulate proceedings in criminal cases. (R. C. 1845, p. 889.)

Appeal from Montgomery Circuit Court.

H. A. Clover and T. Vanswearingen, for the State.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted, as we are informed, by the record, (though no indictment is set forth,) in the Circuit Court of Montgomery, for taking unlawful toll. The defendant appeared and filed his special plea. The State demurred to this plea, and the court overruled the demurrer, and rendered judgment thereon for the defendant, discharging him from said indictment, at the costs of the State. The State thereupon appealed to this court.

The only question before this court is, will an appeal be sustained on the part of the State in a case like this? The statute concerning practice and proceedings in criminal cases must determine this question. Sections 9 and 10 of the 8th article of this act, are as follows: "Sec. 9. The State, in any criminal prosecution, shall be allowed an appeal *only* in the cases and under the circumstances mentioned in the next succeeding section. "Sec. 10. When any indictment is quashed or adjudged insufficient upon demurrer, or judgment is arrested, the Circuit Court, either from its own knowledge, or from information given by the prosecuting attorney, may cause the defendant to be committed or recognized to answer another indictment; or, if the prosecuting attorney prays an appeal to the Supreme Court, the Circuit Court may, in its discretion, grant an appeal." Now this case is not within either of the

classes mentioned in this 10th section. There is no indictment quashed, nor is there any arrest of judgment, nor has this indictment been held insufficient on demurrer. Then, by the express words of the 9th section, an appeal will not be allowed.

Appeals on the part of the State have frequently been dismissed by this court. (State v. Heatherly, 4 Mo. 478 ; State v. Spear, 6 Mo. 644 ; State v. Shoemaker, 7 Mo. 286.) This appeal must therefore be dismissed ; it is taken in a case not provided for by the statute.

It is accordingly dismissed, the other judges concurring.

[END OF OCTOBER TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,
JANUARY TERM, 1856, AT JEFFERSON CITY.

THOMAS, Respondent, v. BLACK, Appellant.

1. The exception in section 7 of article 2 of the statute of limitations of 1845, does not apply where the debtor is a *non-resident* of the state when the cause of action accrues, but only where, being a resident, he is absent.

Appeal from Buchanan Circuit Court.

This was an action begun October 11, 1854, upon a sealed note or bond, dated September 16, 1839, and payable January 1, 1840. The defendant relied upon the statute of limitations. It was admitted that, when the note was executed, the defendant resided in Kentucky, where he continued to reside until 1846, when he removed to Missouri, where he has since resided; and thereupon there was a judgment for the plaintiff. The defendant appealed to this court.

Loan, for appellant. This case depends upon the construction of the 7th section of article 2 of the limitation act of 1845,

NOTE.—SCOTT, J., was indisposed during this term. All the cases of this term were prepared for the press by Mr. SAM'L A. BENNETT, former reporter.

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which is materially changed from the corresponding section of the act of 1835, upon which the cases of *King v. Lane*, (7 Mo. 241) and *Tagart v. State of Indiana*, (15 Mo.) were decided.

Vories, for respondent. The statute did not commence running in favor of the defendant until he came to Missouri in 1846. (*Tagart v. State of Indiana*, 15 Mo. 211; *Carter v. Feland*, 17 Mo. 383, and cases there cited; *Angell on Limitations*, § 64 to 68.)

RYLAND, Judge, delivered the opinion of the court.

In this case, the question arises upon the construction of the 7th section of the 2d article of the statute of limitations of 1845. (R. C. p. 717.) The first section is as follows: "The following actions shall be commenced within ten years after the cause of *such* action accrued, and not after. All actions founded on any writing, whether sealed or unsealed, for the direct payment of money or property." "Section 7. If at any time when any cause of action specified in this article accrues against any person *who is a resident of this state*, he is out of this state, such action may be commenced within the times herein respectively limited, after the return of such persons into the state; and if, after such cause of action shall have accrued, such person depart from, and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of this action."

In this case, the parties admit that the cause of action accrued on the 18th day of January, A. D. 1840. It was founded on a promissory note; that when the note was executed in September, 1839, the plaintiff and defendant were both living in the state of Kentucky, and that the defendant continued to live in Kentucky until the year 1846, when he removed to the state of Missouri, where he has ever since resided; that this action was commenced on the 11th day of October, 1854.

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The defendant pleaded the statute of limitations to this action. The court found for the plaintiff, and this case is brought here by defendant to have the judgment below reversed.

This case is obviously within the body of the statute. The action accrued in January, 1840, and suit was not brought until October, 1854, more than fourteen years after the cause of action accrued. Now is it within the exception made in the 7th section above quoted? We think that it is not. The person mentioned, as against whom the cause of action accrues in that section, must, at the time it accrues, be a resident of this state. Then, if he, though a resident of this state, be out of it when the action accrues, the action may be brought within the time limited, after the return of such person into the state. The person must be a resident of this state when the action accrues. Here the defendant was a non-resident: he was living in Kentucky, and there continued to live until long after the cause of action accrued. He is not such a defendant as the seventh section was designed to embrace; nor is he embraced by its provisions. Then the statute was in his favor, and the exception does not place him out of the general protection afforded by the statute. This statute of 1845 differs from the statute of 1835, under which the case of *King v. Lane*, (7 Mo. 241,) was decided: the words, "*who is a resident of this state*," are not inserted in the act of 1835. This is a material distinction. In the case of *Tagart, administrator of Slone, v. The State of Indiana*, (15 Mo. 209); the question was not considered as under the act of 1845. Neither the counsel for the parties nor the court make any mention of the statute of limitations of 1845; but the case was determined upon the authority of *King v. Lane*, under the statute of 1835. The counsel for the appellant did insist upon a review of that decision, and the opinion of this court is mainly upon that subject. Nothing is said in the opinion in relation to the act of 1845; but the statute of 1835 is quoted and commented upon, and authorities cited to maintain the view of the court, as delivered in the case of *King v. Lane*, upon the statute of 1835. If,

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therefore, the decision of the case of Tagart, administrator of Slone, v. The State of Indiana, is to be considered as having been made under the statute of 1835 only, and as confirming the doctrine laid down in King v. Lane, it is correct; but if it be considered as made in reference to the act of 1845, it is incorrect, and must be considered as overruled.

The judgment of the court below must be reversed; and the other judges concurring, the same is reversed.

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HOOK, Plaintiff in Error, v. TURNER, Defendant in Error.

1. The defendant may rely upon the statute of frauds as a defence to a petition for the specific performance of a parol contract to convey land, although he does not set it up in his answer, but simply denies the contract.
2. A contract in consideration of refraining from bidding at a judicial sale is void.

Error to Calloway Circuit Court.

Petition for the specific performance of a contract to convey a portion of land purchased by the defendant at a sale, alleged in the petition to have been made at the court-house door in the town of Fulton for the purpose of distribution among the heirs of Elijah Dawson, deceased. The petition stated that the plaintiff and defendant both wanted a part of the land to be sold, and that it was agreed between them before the sale, that they would run the land up to a certain price, and that defendant should bid in the land in his own name, and should afterwards convey to the plaintiff the part sought to be recovered in this suit, upon the same terms that he himself obtained it, and that the plaintiff had made a tender of the price agreed upon. The defendant, in his answer, denied the contract, as well as the tender. The trial was by the court without a jury, and the facts found as stated in the opinion of Judge Ryland.

J. F. Jones, for plaintiff in error. 1. The statute of frauds does not operate in cases of either fraud or trust. (16 Mo. 544; 4 Kent, 305-7; 1 Lomax Dig., 200-3; 20 Mo. 84;

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15 Ves., 50; 6 B. Mon., 106; 2 Sto. Eq., 759; 1 Johns. Ch'y., 149; 1 Vern., 159; 2 Vern., 445; 4 Conn., 568; 1 P. Wms., 771; 1 W. & S., 136; 2 Coms., 821; 3 Gilm., 529; 11 Paige, 481.)

Hardin, for defendant in error. 1. The relief sought is the performance on the part of the defendant in error of a parol agreement for the conveyance of land. It is not claimed by plaintiff that he had possession of, or made improvements on the land under the agreement; nor that there was even part payment of the purchase money; nor that defendant even owned the land when the agreement was made. Beyond these facts courts can not compel performance, when the defendant by his answer denies the agreement, or, if admitting it, claims protection under the statute of frauds. (Sug. on Vendors, p. 127; 3 A. K. Marsh., 445.) 2. Where no bill of exceptions is preserved, and where the record does not show any exceptions taken by the plaintiff in error to the opinions or decisions of the court, upon motion made by plaintiff, the judgment must be affirmed. (13 Mo. 424.)

RYLAND, Judge, delivered the opinion of the court.

There are two objections to the relief sought by the plaintiff in this action, both fatal to his right of recovery. In the first place, the contract as set forth in the plaintiff's petition is a verbal contract, not reduced to writing; nor is there any memorandum or note thereof in writing, signed by any one; it is a verbal contract respecting the sale of land: at least, it is of and concerning an interest in land. It is clearly within the statute of frauds and perjuries. The defendant denies the alleged contract in his answer. He expressly states that there never was such a contract entered into as set up in the plaintiff's petition, or any contract of any kind for the land aforesaid by and between plaintiff and defendant.

The court that tried the case found the following facts: That "Turner agreed with Hook that if Hook would not bid against him for a tract of land, situated between their farms,

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he would buy the tract, and divide it between them in a manner agreed upon by them at the rate he paid for the tract; Turner bought the land—the plaintiff offered him the money agreed upon for the part he was to have, and the defendant refused to let him have the land. On this state of facts, the court find for the defendant.”

The plaintiff, without making any motion for a review of law or fact, and without any exception taken and saved to any ruling of the court below, brings the case here by writ of error, and relies upon the point, that as the defendant did not plead the state of frauds, he cannot invoke its aid to defeat this suit. But the decisions will not support him in this view. Where the defendant in his answer denies the contract, it is not necessary for him to insist upon the statute as a bar. (*Wildbahn v. Robidoux*, 11 Mo. Rep. 660.) But the plaintiff, in such case, must produce legal evidence of the existence of the agreement, which can not be established by parol proof. (3 Paige, 481; 2 Paige, 181; 3 A. K. Marshall, 445.) Upon this ground the plaintiff can not recover.

The second ground also is fatal to his right to recover. If the sale at which the land in controversy was sold was a judicial sale, as it seems to have been from the manner the plaintiff has set it forth in his petition, then the contract as alleged by the plaintiff was against public policy, and for that reason the court would not enforce it at the suit of any of the parties. (*Wooton et al. v. Hinkle*, 20 Mo. 290.) However this may be, the contract is clearly within the statute of frauds, and the court below decided properly in favor of the defendant. The judgment is affirmed; Judge Leonard concurring.

WOODS, CHRISTY & Co., Defendants in Error, v. T. W. &
J. R. MOSIER, Plaintiffs in Error.

1. The Supreme Court will not disturb a judgment rendered upon an insufficient publication, unless a motion to set the same aside has been made in the inferior court.

London v. King.

Error to McDonald Circuit Court.

Hendrick, for plaintiff in error.

F. P. Wright, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

The plaintiffs brought their suit, upon a promissory note, against the defendants, in the circuit court of McDonald county. The summons and petition were personally served on one of the defendants, Thomas W. Mosier, and there was constructive service on the other defendant by order of publication in a newspaper. The circuit court rendered judgment by default against the defendants, and they bring the case by writ of error to this court; and rely upon the insufficiency of the published notice. In looking into the record, it seems that no motion has been made to set aside the proceedings in the circuit court, and until that is done, this court does not interfere to correct the supposed error. (*Alexander v. Hayden*, 2 Mo. 211, side paging; 10 Mo. 457; 15 Mo. 207, 208.) The judgment must be affirmed; Judge Leonard concurring. Judge Scott absent.

G. B. & B. G. LOUDON, Defendants in Error, v. KING & STARNES, Plaintiffs in Error.

1. A motion to set aside a judgment by default is no part of the record, unless made so by the bill of exceptions.
2. No finding of facts is necessary upon an assessment of damages after a judgment by default.

Error to McDonald Circuit Court.

Gardenhire, for plaintiffs in error.

F. P. Wright, for defendants in error, cited 20 Mo. 263; 10 Mo. 257.

RYLAND, Judge, delivered the opinion of the court.

This was an action for a bill of drugs and medicines, furnished by plaintiffs, as they allege, to the defendants. The defendants failed to appear and answer, though they were served with process. Judgment was rendered against the defendants by default; and the plaintiffs not requiring a jury, they submitted the inquiry of damages to the court. The court assessed the damages of the plaintiffs at the sum of one hundred and twelve dollars and fifty cents. This judgment by default was rendered at the November term of the Circuit Court, for the county of McDonald, in the year 1854. At the May term, 1855, the defendants made their motion to set aside the judgment by default: the court overruled this motion. There are no exceptions taken to any action of the court; no bill of exceptions filed; and yet the defendants have brought this case here by writ of error.

It is not every motion made in a cause that becomes part of the record, even though the clerk should put it down among the proceedings. In order therefore to put the motion made in this case to set the judgment aside on the record, so as to become a part thereof, it was necessary to do so by excepting to the overruling of the motion by the court, and having a bill of exceptions signed, stating that fact. Nothing is saved on this record by which the defendants can raise a question in this court.

Their counsel here insists, that the court failed to find the facts of the case. To that we answer, the court was not trying any issue, as is provided for in the fifteenth article, second section, of the Code of Practice; but was merely assessing the damages, as it was lawful to do, when the plaintiffs submitted the finding of damages to the court, without a jury, under the 12th article of the Code. There is nothing in the transcript showing any error committed by the court, in overruling the defendant's motion, even if we consider the motion and action on it as forming part of the record proper

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in the case. No error has been insisted upon before us, except the failure of the court to find the facts; which is not necessary in this case, as there was a judgment by default.

The judgment below, must be affirmed; Judge Leonard concurring. Judge Scott absent.



PEMBERTON *et al.*, Respondents, v. PEMBERTON, Appellant.

1. A parol gift of a slave to one for life, remainder to her children, then living, followed by the possession of the donee for life, is valid.

Appeal from Calloway Circuit Court.

The case is stated in the opinion of the court.

J. F. Jones, for appellant; that a remainder in personal property could not be limited by parol; cited 1 Black. Comm., 398, and note 11; 1 P. W'ms., 290; 2 Kent's Comm., p. 352, and notes; 13 Conn. Rep., 42; Cro. Jac., 459; 1 Bailey's (S. C.) Rep., 100; 1 Dana, 237; 3 Dev. (N. C.) Rep., 263; 10 Johns. Rep., 11; 11 Wend., 259; 4 Kent's Comm., 264; Fearn on Remainders, 460, 461, 463, 464, and notes; 2 Vesey, Sr., 171; Pollexfen, 29; 6 Ves., Jr., 440; 11 Ves., Jr., 257; 2 Ves. and Beames, 63; 19 Ves., Jr., 73; 1 Merivale, 20; Ib. 271; 2 Roper on Legacies, (2d ed.,) 393; 1 Ves., Sr., 133, 134.

Thomas Ansell, for respondent, cited 2 Hall, 543; 2 Strob. Eq., 243; 3 Murph., 493; 3 Mon., 276; 3 Bibb, 40; 2 Kelly, (Geo.,) 207; 2 Bouvier's Inst., 294-5; R. C., 1845, p. 588.

RYLAND, Judge, delivered the opinion of the court.

Nehemiah Hundley gave to his daughter Susan Pemberton, then the wife of Edmund Pemberton, and the mother of the plaintiffs, in January, 1842, a certain negro woman named

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Abigail, and her increase. The words of the old gentleman, for it was a verbal gift, are, "I then gave Susy Pemberton, my daughter, Abigail and her increase, for life, and at her death, for her and her increase to be equally divided among her children." "I sent Abigail the next morning to Susy Pemberton." Susan Pemberton, the mother of the plaintiffs, died in the year 1846, and her husband, Edmund, died in October, 1853.

Edmund Pemberton, after the death of his wife Susan, married again, and the defendant in this action is his widow. This suit is brought to recover a negro boy named Lewis, a child of the said negro woman Abigail, in the possession of the defendant, and claimed by her under the will of said Edmund Pemberton.

The question involves the validity of this disposition of the negro woman Abigail and her increase. Is such a disposition of a slave, without writing, good, in favor of the children after the death of the mother? The circuit court held that it was, and the defendant brings the case here by writ of error.

The statute of 1835, concerning gifts of slaves, is as follows: "Article III, section 1. Slaves shall be held, taken and deemed to be personal property." Section 2. No gift of any slave shall pass or vest any right, estate or title in or to such slave in any person or persons whatsoever, unless the same be made—1st. By will duly proved and recorded; or 2d. By deed in writing, to be proved by not less than two witnesses, or acknowledged by the donor, and recorded in the county where one of the parties lives, within six months after the date of such deed. Section 3. This law shall only extend to gifts of slaves, whereof the donors have, notwithstanding such gifts, remained in possession, and not to gifts of such slaves as have at any time actually come into the possession of, and remained with the donee, or some person claiming under such donee."

From this statute, it is obvious that a parol gift of a slave accompanied by possession, like the gift of any other kind of personal property accompanied with possession, is good and

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valid. Such a gift needed no writing, neither deed nor will, to be a valid act, passing title from donor and vesting title in donee; all that is necessary in such gifts, made *bona fide*, is the possession of the gift by the donee. So far then as respects the gift of Abigail, the negro woman, by Mr. Hundley to Mrs. Susan Pemberton, his daughter, in this case, it is beyond controversy good and valid; for possession immediately accompanied the gift and remained with the donee.

Was it in the power of the donor to make this gift to his daughter for life, and then to become the property of her children? The children in this case were alive at the time the donation was made to their mother for life, and to them after her death. This donation gave to the mother a life estate, and a vested remainder to her children. The delivery of the possession to the mother, the tenant for life, was a delivery, *pro hac vice*, to her children.

The question arising in this case has been virtually settled by this court, in the case of Halbert v. Halbert and others, decided at July term, 1855, (see 21 Mo. 277.) There a father gave to his son a slave, upon the condition, that if the son died without leaving issue the slave should revert to the father—a parol gift. The circuit court decided, in an action brought by the father for the slave, after the death of the son without leaving any child living, that the gift to the son, accompanied by the possession, conveyed the absolute property in the slave to the son, and that the plaintiff could not recover. This court reversed that decision and remanded the case; remarking, that one question of inquiry before the jury was, whether the transaction was a gift; and if it was a gift, whether it was absolute or qualified; and if qualified, what was the qualification annexed to it; was it a condition that the slave should be the son's, if he had children born to him? or was it a provision to transmit the slave to the son's descendants, as long as there should be any descendants; and to secure a return of the slave to the giver upon a failure of descendants, whenever that event should occur? We had actually remarked, that if it were the

former, it would be a lawful purpose and must prevail; if the latter were the intention of the father, the law will not carry it into execution, but makes the grant take effect as an absolute immediate gift of the whole property to the son.

In the case of Keene and West v. Macey, (3 Bibb, 30,) the court of appeals of Kentucky held, that when A. gives slaves to W. for life, with remainder to the children of W., the remainder was good. In this case, it appeared that Cornelius Duvall executed a bill of sale, disposing of certain negroes, of which he was the rightful owner, to his daughter, Esther West, during her natural life, and after her decease to be equally divided between such of her children as might be then living. Esther West died leaving Vandever West, and the wife of Keene, two of her children then living. West and Keene being possessed of part of the negroes, Macey, claiming by purchase from Rezin West, the husband of Esther, brought an action of detinue against them for the negroes in their possession. *Non detinet* was pleaded, and issue joined thereon. On motion of Macey, the circuit court instructed the jury, that the remainder over of the slaves to the children of Esther West was void; that the sole and absolute property in the negroes passed by the bill of sale to Esther West, and that by operation of law the right thereto accrued to and became vested in her husband Rezin West, under whom Macey claimed title. Macey recovered, and the case was taken to the court of appeals. By the 33d section of the act of 1798, respecting slaves, it is enacted, that no remainder of any slave or slaves shall or may be limited by any deed or last will and testament, in writing of any person whatsoever, otherwise than the remainder of a chattel personal, by the rules of the common law, can or may be limited.

The court observed, the only question involved in the determination of this cause is, whether, by the rules of the common law, a chattel could be granted to one for life, with a limitation in remainder to another? It was anciently held, that chattels in their nature were incapable of any limitation over, and that a grant or devise of them, but for an hour or a min-

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ute, was a gift forever. Hence, it was a long time before courts of justice could be prevailed upon to have any regard for a devise over, even of a chattel real or term for years, after an estate for life limited therein; and to get out of the literal authority of the old cases, a distinction was formerly taken, that a remainder might be limited for the residue of the years, but not for the residue of the term. But by a train of adjudged cases, that distinction does not now exist. And the remainder of a term, or of a personal chattel, may be limited by will, whether the term or the lease, or the use and occupation of the land, or the lands themselves, or the use of the chattel, be bequeathed. (3 Saund. 388, note 9 h., and authorities there cited.) To answer the agreement of parties and the exigencies of families, the same reason required that such limitations might be made by deed. (Wright v. Cartwright, 1 Burrow, 292.) Blackstone, in his commentaries, 2 vol. 398, acknowledges, that by the ancient rules of the common law, there could be no future property to take place in expectancy created in a personal chattel; but says, if a man now, either by deed or will limits furniture, &c., to A. for life, remainder over to B., it is good. In Higginbotham v. Rucker, (2 Call, 313,) the court of appeals of Virginia decided, that a gift of a slave to one for life, with a remainder to his children, was a good limitation.

The court then reversed the judgment of the circuit court for the wrong instruction given, thereby maintaining that the remainder to the children was good. Here the remainder was to the children living at the death of their mother, Esther West. In the case at bar, the remainder was to the children of Susan Pemberton, then living, at the date of the gift—not to such as should be living at her death. “I gave Susy Pemberton, my daughter, Abigail and her increase, for life; and at her death, for her and her increase to be equally divided among her children.” The children of Mrs. Pemberton, the present plaintiffs, were then in the mind of the donor. He knew them, and they were the objects of his bounty ultimately.

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This case does not present the question of a donation to take place in future, the donor retaining the use and possession for his life. Here is nothing but a simple donation of property to persons in being, the one to have it for life, and the others to have it after the first taker's death; and where, in such gifts, the possession accompanies the property in the hands of the donees, there can not be a reasonable objection to their validity. Our statute requires wills or deeds, in such gifts of slaves, where the donor retains possession notwithstanding the gift. It does not require any instruments to be written concerning those gifts, where the property given is immediately delivered to the donee. Now, as by our law such a parol gift of slave is good to the donee when possession accompanies it, and every person has by law the right to make such gifts; where do we find the limitation to this power, to this right to make the gift for the life of one, and at his death to another? He who can give, by parol, the whole estate absolutely, can surely give a life estate to one, and the remainder thereof to another. The only thing necessary to make such a gift good under our law, is possession in the tenant or donee, for life, and that possession shall be construed to be the possession of the remainder man.

In *Higginbotham v. Rucker*, the father gave to his daughter, after her marriage, certain negroes "to her and the heirs of her body; and in case she died without issue, that is, children of her body, the negroes were to return to the father." This limitation was held by the court of appeals of Virginia to be not too remote, and therefore good. In an action by the father against the husband of his daughter, for the negroes, the daughter having died without issue, the father was permitted to recover. (2 Call's Rep. 313.)

In *Brummett v. Barker*, decided in South Carolina, in 1834, the donor undertook by parol to give a life estate to his niece with a remainder over, on her dying without leaving issue. Assuming (as well settled) the principle that such limitation by deed would be valid, the court proceeds to discuss the question whether a valid limitation over, after the determi-

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nation of a precedent life estate, might not be created by parol; and then decides the question in the affirmative. Judge O'Neill, in delivering the opinion of the court, uses the following language: "There is nothing to prevent a trust in personal property from being created by parol, either written or unwritten, and that, even without resorting to the doctrine in relation to trust of personal property; as it was clear, that any thing that was good and effectual in law to pass personal property, was equally so to limit it." See the elaborate opinion of Chancellor Dargan, in the court of errors of South Carolina, in the case of Daggers v. Estes in 1848; reported in 2 Strob. Equity Rep. 354. In this opinion most of the cases upon this subject have been ably reviewed.

I do not think it necessary to review the cases myself, satisfied that such gifts as the one in this case now at bar, where possession accompanies the gift, are common in our state, and have always been considered valid.

There is no error in the court below in giving the instructions or in permitting the parol evidence of the gift. As to the error assigned in arrest of judgment, it is without a particle of force. It needs no comment from this court.

Judge Leonard, concurring, the judgment below will be affirmed.

WEST and wife, Respondents, v, FORREST, Appellant.

1. The rejection by the court trying a cause of a competent juror is no ground for renewal in the supreme court, there being no valid objection to the jurors empannelled.
2. A party, in whipping a female slave, unintentionally but recklessly inflicted blows upon her mistress. In an action by the mistress, *held*, that the defendant's liability was not limited to the damages to her *person*; that the jury might take into consideration the mental anguish and wounded feelings of the plaintiff.

Appeal from Buchanan Court of Common Pleas.

Action for an assault and battery. The facts are stated in the opinion of the court. The fourth instruction given by the court below was to the effect that the jury, in estimating the damages, if they believed the assault was "unintentionally but recklessly committed," might "take into consideration the pain and suffering, mental anguish and wounded feelings of the female plaintiff."

The third instruction asked by the defendant, and refused, was, that "the measure of damages is a sum of money precisely commensurate with the wounded feelings of the plaintiff, Alvira B. West, by reason of the infliction of the blows."

The plaintiff had a verdict of \$400, and the defendant appealed.

Vories, for appellant. 1. The court below erred in rejecting a competent juror who was not challenged by the plaintiff. 2. The court erred in giving the fourth instruction. (2 Greenl. Ev. § 267, and note; 5 Mo. 523.)

Gardenhire and *Morrow*, for respondent, that the rule of damages was properly laid down, cited *Littell's* selected cases, 81; 1 Mass. Rep. 11; 3 Wend. Rep. 391; 7 Monroe, 395; 11 Pick. 379; 2 Gilman, 432; and insisted that the rejection of the juror was no ground of reversal, as it did not appear that the appellant was prejudiced.

RYLAND, Judge, delivered the opinion of the court.

This was an action of assault and battery, alleged to have been committed by the defendant, on the female plaintiff, Alvira B. West, wife of Francis A. West. The defendant denied having assaulted the said Alvira E. West, but stated that he was whipping a negro woman, whom he had hired of Francis A. West, and who had left his house and gone back to her master's house; that he went after her and found her, and ordered her to go back to his house; but, instead of obeying him,

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she attempted to go up the steps to the room where her mistress, Alvira B. West, was ; that he commenced whipping her with a cowhide ; that Mrs. West came down the steps, and the negro woman ran and caught her around the waist, and with great force conveyed her back into the house ; that if Mrs. West was struck, he did not know it, and did not intend it. At the trial, the court, after a certain man had been called up and sworn, and examined as to his qualifications as a juror, discharged him and made him stand aside. The defendant excepted to this act of the court, alleging that the man was a competent and fit person to be made a juror. He assigns this act of the court as one of his errors upon which he seeks to reverse the judgment below. There is nothing in this point ; the jury empannelled was no doubt a good, competent and impartial one. The defendant has not been injured, nor have any of his rights or privileges been improperly denied him by the inferior court. If this court should reverse the judgment below for this act, does the appellant expect to have the man on his next jury ; or does he suppose that this court would so far step out of their legitimate sphere as to direct the inferior court to place the rejected man on the next jury ? The absurdity of such a proceeding is manifest. There is nothing then in this point.

The evidence clearly shows a very severe beating of the negro woman ; and that she ran to her mistress up the steps leading to the door of the room occupied by Mrs. West. The negro woman laid hold of her mistress on the steps, and the evidence leaves little doubt that the defendant did not stop his blows when the negro woman caught her mistress, but he continued to inflict them. One witness says, he saw his arm in motion up to the door as though he were striking. Is it strange that Mrs. West, the owner of the negro woman, should have been (even in her situation, some seven or eight days after childbirth) drawn to the steps of her door by the severe whipping and hallooing of her own servant ?—the blows inflicted by the defendant, and the screams of the negro woman, raising the

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indignation of the witnesses who were a block and a half distant, and prompting them to stop work and go and see the cause of the terrible whipping and hallooing. No wonder, under such circumstances, that Mrs. West should step half way down the steps leading from her room to the yard; and no wonder she should by her presence try to save her servant.

The plaintiff's case was clearly made out before the jury, and by their verdict of four hundred dollars damages they exhibited their sense of such a wrong, and properly vindicated the injuries and wounded feelings of the plaintiff. There is nothing in the instructions given, nor in those refused to be given, calling for the interference of this court.

The case was fairly put to the jury, and this court does not feel itself authorized to interfere. Let the judgment below be affirmed; Judge Leonard concurring.



CANEFOX, Respondent, v. ANDERSON & CRENSHAW, Appellants.

1. A note is executed to three partners, two of whom upon a settlement of the partnership affairs, for value, sell and transfer by delivery their interest in the note to the third. *Held*, that the third might sue on the note in his own name.

Appeal from Greene Circuit Court.

The case is stated in the opinion of the court.

No appearance for appellant.

Wright and Morrow, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was a suit upon a promissory note, executed by defendants, payable to the plaintiffs, Thomas W. Anderson and Joseph Carthol, a firm by the name and style of B. W. Canefox & Co., or order, fifteen days after date, for four thousand seven

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hundred and seventy dollars and fifty-seven cents, dated October 14, 1853.

In his petition, plaintiff avers that Thomas W. Anderson and Joseph Carthol sold their interests, respectively, in the said note to the plaintiff for a valuable consideration, by which the said note became the property of the plaintiff; that Thomas W. Anderson, on the 29th of October, 1853, paid on said note the sum of six hundred dollars; that the remainder of said note and interest are yet due to plaintiff, for which he asks judgment.

The defendants answered, stating that, as to the said supposed purchase of said note by plaintiff for a valuable consideration, whereby he became the owner thereof, they have not knowledge thereof sufficient to form a belief. The cause was submitted to the court for trial, without a jury, and the court found the facts to be, that the defendants, by their promissory note, dated October 14, 1853, promised, for value received, to pay plaintiff and Thomas W. Anderson and Joseph Carthol, (which was a firm trading and doing business by the name and style of B. W. Canefox & Co.,) or order, fifteen days after date, the sum of four thousand seven hundred and seventy dollars and fifty-seven cents, which note was executed in consideration of goods purchased of said firm; and afterwards, on the 28th day of October, 1853, and before said note became due, the said partners of said firm had a settlement of their affairs, and the said Thomas W. Anderson and Joseph Carthol, for a valuable consideration, and in consideration of indebtedness of said firm to plaintiff, sold and transferred all their interest in said note to plaintiff, by delivery; and said firm delivered said note to plaintiff, whereby the said plaintiff became the sole owner of said promissory note, having accepted the same upon said settlement with his said partners, in lieu of so much money; the court doth further find that the said defendant, Thomas W. Anderson, on the 29th of October, 1853, paid on said note the sum of six hundred dollars. The court find that said Thomas W. Anderson and L. A. D. Crenshaw justly owe and are in-

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debted to said Benjamin W. Canefox, in the sum of four thousand five hundred and eighteen dollars and seventy-three cents, and judgment was accordingly rendered for plaintiff for that sum, with costs, &c. The defendant moved for a review, because the finding was insufficient. This motion was overruled, and he excepted, and brings the case here by appeal. In looking over the record, we find no error, and indeed the appellants have not assigned any errors in this court.

The finding of the court sufficiently states the facts, and the facts found support the judgment rendered by the Circuit Court. The judgment below will therefore be affirmed, with five per cent. damages. Judge Leonard concurring.

NEAL AND OTHERS, Defendants in Error, v. SMITH, Plaintiff
in Error.

1. Where a partition sale is set aside on a motion which is contested by the purchaser, it is within the discretion of the court to tax the costs of the motion against him.

Error to Cooper Circuit Court.

This was a motion to set aside a partition sale. The case was once before in this court, (see 20 Mo. 294,) and was reversed and remanded. Upon a second hearing, the sale was set aside, and the Circuit Court taxed the costs of the motion against Smith, the purchaser, who now brings the matter here by writ of error.

Gardenhire, for plaintiff in error, insisted that the motion to set aside the sale was a step in the original cause to which the purchaser was not a party, and that the Circuit Court erred in taxing the whole cost of it against him. (R. C. 1845, p. 245, § 22; 20 Mo. 296; Sess. Acts, 1847, p. 106.)

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Adams, for defendant in error, that the costs were properly taxed, referred to the act concerning costs. (R. C. 1845, § 7 and 22.)

RYLAND, Judge, delivered the opinion of the court.

The only question in this case involves the propriety of the action of the court below in ordering the costs of the motion made to set aside the sale, to be taxed against the purchaser, Smith.

This was originally a petition for partition of real estate. The court ordered a sale of the land for that purpose. George W. Smith purchased the real estate at the sale made by the sheriff. James S. Hughes and others (some of the parties to the original proceeding for partition) moved to set aside the sale made, and Smith, the purchaser, contested this motion. The Circuit Court overruled the motion; the case was brought before this court and the judgment of the court below was reversed, and the case remanded for trial. On the second trial of the motion, issues were made involving the character of the sheriff's sale, and alleging its fraud and illegality. These issues were found in favor of the motion, and the Circuit Court set aside the sale made by the sheriff and taxed the costs of the motion against Smith, the purchaser, and sole opponent of the motion. Of this Smith complains, and has brought the matter before this court.

In this matter, Smith, by his counsel, contends that the costs of the motion ought to have been taxed as the other costs of the proceedings in partition, and should be paid by the parties interested therein. But such is not the opinion of this court. By the 6th section of art. 1st of statute concerning costs, (R. C. 1845, p. 242,) the court has express authority to tax the costs of this motion against the party unsuccessful. In all civil actions or *proceedings of any kind*, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law. "Sec. 7. On all motions, the court may give or refuse costs at its discre-

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tion, unless where it is otherwise provided by law." Now the 22d section of the same article, which declares that, "In all cases founded on the statute concerning partition of land, the petitioner or petitioners shall pay all costs in the first instance, but shall be entitled to judgment against each of the parties interested in the partition, for such part of the whole costs attending the proceeding as shall be proportionate to the amount of his interest," &c. ; and the 2d section of the act of 1847, amendatory of the partition act of 1845, which declares that, "In all cases of partition, arising under the above act, (that is, act of 1845,) the necessary expense attending such partition, together with a reasonable attorney's fee, to be assessed by the judge of the court before whom partition is had, shall be equally taxed against all persons interested in such partition, in proportion to their respective interests therein," are not to be considered as otherwise expressly providing in relation to these interlocutory costs. Nor do these last provisions take away the discretionary power of the court in relation to such interlocutory costs. The Circuit Court, then, had the authority to tax the costs on this motion against Smith ; and, having done so, we can not say that the discretion was abused. Indeed we think it would have been improperly exercised, if it had failed to tax him with the costs.

Let the judgment be affirmed, Judge Leonard concurring ; Judge Scott sick, absent.

COGGBURN, Defendant in Error, v. SIMPSON, Plaintiff in Error.

1. The agent who sells goods, of which he is in possession, as his own property, may recover the price in his own name.
2. Where a party is in possession of a store, as a clerk or agent of another, his possession is that of his principal.

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Error to Cole Circuit Court.

Action by Jackson Coggburn on an account for goods sold and delivered, commenced before a justice of the peace.

At the trial in the Circuit Court on appeal, it appeared that the goods were purchased at a store in which the plaintiff was doing business, either as agent or proprietor, and the only dispute was, whether the store belonged to the plaintiff or to Green B. Coggburn, and upon this point evidence was offered by both parties. Among others, the Circuit Court gave for the plaintiff two instructions, set out in the opinion of the court, and refused the seventh instruction asked by the defendant, also set out in the opinion. There was a verdict and judgment for the plaintiff, and the defendant brought the case here by writ of error.

M. M. Parsons, for plaintiff in error.

Gardenhire and Morrow, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

The question between the parties in this case involves the mode in which the goods were sold. If the plaintiff sold the goods to the defendant as his own property, or if the goods were purchased by defendant as the property of the plaintiff, then the contract to pay for the goods was a contract to pay plaintiff, and, of course, he has the right to recover in this suit for the goods thus sold. But if the plaintiff sold the goods as the agent of Green B. Coggburn, and as Green B. Coggburn's goods, then the contract to pay for the goods was a contract to pay Green B. Coggburn and not to pay the plaintiff, and consequently the plaintiff can not recover for the goods in this action. The case, therefore, depends upon the simple fact, as to the sale of the goods as the plaintiff's property, or as the property of his brother, Green B. Coggburn. All that part of the record in which the question about Green B. Coggburn selling or conveying the goods to his brother, the plaintiff, in order to defraud his creditors, is foreign to the matter in issue between

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these parties. The question whether the alleged sale of the goods from Green B. to Jackson Coggburn, was made to defraud Green's creditors, was not in issue between them. All therefore which the record contains in regard to this matter is thrown out of the case and disregarded by this court, and must be so in the further trial hereof. In looking over the instructions asked by the defendant below, in our opinion, his seventh instruction ought to have been given.

The court told the jury, in the first instruction given for the plaintiff, that, "if the jury believe from the evidence that Simpson purchased of Jackson Coggburn goods of which he (Jackson Coggburn) was in possession at the time of Simpson's purchase, and that Jackson Coggburn was the owner of the goods at the time of the sale to Simpson, they must find for the plaintiff the balance due for the goods."

The second instruction for the plaintiff was as follows: "Even though Jackson Coggburn was not the owner of the goods at the time of the sale to Simpson, yet, if he had possession of them and sold them in his own name, he had the right to sue for and recover the balance due for them in his own name, and Simpson not having filed any offset in this case, either against Jackson Coggburn or Green B. Coggburn, is, in such case, liable to the present plaintiff for the balance due for the goods;" and, disregarding all the other instructions asked for by defendant, let us see his seventh instruction, namely: "That, although Jackson Coggburn may have had possession of the store at Spring Garden, yet, if the jury believe that he had such possession as clerk or agent of Green B. Coggburn, such possession of Jackson Coggburn was, in law, the possession of Green B. Coggburn." This instruction should have been given. It was important to the proper understanding of the case, in conjunction with the two instructions for the plaintiff above recited.

For failing, then, to give the defendant's seventh instruction, the court below committed error. Its judgment is reversed and cause remanded; Judge Leonard concurring.

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KIRBY, Plaintiff in Error, v. JOHNSON, Defendant in Error.

1. A contract was made for the sale of cattle in the field of the seller. The purchaser told the seller to keep the cattle and feed them until he sent for them, at the expense of the purchaser. The seller agreed to do so, but told the purchaser that, if any of them died, he must bear the loss, to which the latter assented. *Held*, no delivery to take the contract out of the statute of fraud.

Error to Jackson Circuit Court.

The facts appear in the opinion of the court.

Napton, for plaintiff in error, insisted that there was a sufficient delivery to take the contract out of the statute, and cited *Elmore v. Stone*, 1 Taunt. 457; *Chaplin v. Rogers*, 1 East. 192; 11 Johns. Rep. 284.

Reid, for defendant in error, cited *Shindler v. Houston*, 1 Comstock, 661.

RYLAND, Judge, delivered the opinion of the court.

The only question in this case is, whether the contract between the parties is within the statute of frauds and perjuries or not.

The facts of the case are as follows: The plaintiff was buying cattle for California, and being at defendant's house, he went with the defendant to look at some cattle in the defendant's pasture. They were unable to agree as to the price of the lot, but traded for four yoke of oxen, at the price of forty dollars per yoke. Plaintiff told defendant that he had not the money with him; but if the defendant would go home with him, or would go back to town with him, he would pay him. Defendant replied that it did not matter about the money; he could pay it when he came for the cattle, which would suit as well. Plaintiff then told defendant that he was not prepared to drive the cattle away, and requested defendant to keep them for him until he sent for them, and to feed them, as he wished

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them well fed, for which he would pay him well. The defendant agreed to do so. The oxen were not removed from the pasture: the contract was not reduced to writing; nor was any money paid. After plaintiff had started to leave, defendant called to him and said, "remember, if any of the cattle die, they die yours, and you must bear the loss." To which plaintiff replied, "certainly." The defendant sold the cattle the next day, for fifty dollars per yoke, to another purchaser.

The suit is to recover the forty dollars, the difference in the price. It was originally brought before a justice of the peace, in whose court the plaintiff obtained judgment. The defendant appealed to the Circuit Court, where, on trial, the defendant had judgment; that court holding, that the contract was within the statute of frauds, and that the plaintiff was not entitled to recover.

The plaintiff brings the case here by writ of error, and contends that the contract was not within the statute of frauds, as the facts show there was a sufficient delivery to take it out of the statute, and he relies upon the cases of *Elmore v. Stone*, 1 Taunt. Rep. 457; *Chaplin v. Rogers*, 1 East. 192, and *Vincent v. Germonds*, 11 Johns. Rep. 284.

The defendant in error, on the other hand, contends that the facts show the contract to be clearly within the statute of frauds; that delivery and acceptance must be evidenced by some act of the parties, and that no mere words, however significant, are sufficient; and he relies upon the case of *Shindler v. Houston*, (1 Comst. Rep. 261.)

Our statute of frauds and perjuries, § 6, declares that "no contract for the sale of goods, wares and merchandise, for the price of thirty dollars or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized." This is, substantially, the 17th section

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of the English statute of frauds and perjuries, (29 Charles II.) The English statute fixes the price of the goods at ten pounds or upwards; our statute at thirty dollars or upwards; in other respects the two sections are almost literally the same. Although the statute of frauds and the statute of limitations were both so much objected to at the time when they were passed that the English judges appeared anxious to get them off the statute book, yet, in later times, the judges have become desirous of giving to these statutes their full effect. (*Proctor v. Jones*, 2 Car. & Payn. Rep. 532—remarks of Best, chief justice.) “It has been said that the English statute of frauds and perjuries (29 Car. II, c. 3) carries its influence through the whole body of our civil jurisprudence, and is, in many respects, the most comprehensive, salutary, and important legislative regulation on record, affecting the security of private rights. (2 Kent’s Comm., p. 647, note *d*.) I concur in ascribing to this statute all that has been said in its praise by the American commentator. To make the contract of sale valid, under this statute, there must be a delivery or tender of it, or payment or tender of it, or earnest given, or a memorandum in writing, signed by the party to be charged; and if nothing of the kind takes place, it is no contract.” (2 Kent’s Comm. 647, 494.)

It may not be amiss to examine some of the cases on the subject, as decided by the English, and also by the American courts.

✓ In *Baldry and others v. Parker*, 2 Barn. & Cres. 37, (9 Eng. C. L. R. 16,) Abbott, chief justice, said: “We have given our opinion upon more than one occasion, that the 29 Car. II, c. 3, is a highly beneficial and remedial statute. We are, therefore, bound so to construe it as to further the object and intention of the legislature, which was the prevention of fraud.” It appeared from the facts in this case, that the defendant went into the plaintiff’s shop and bargained for various articles. Some were severed from a larger bulk, and some he marked in order to satisfy himself that the same were after-

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wards sent home to him. A separate price for each article was agreed upon. The defendant desired that an account for the whole might be sent to his house, and then he left the plaintiff's shop; a bill of parcels was accordingly sent, together with the goods, when the defendant refused to accept them; the court held that there was no delivery and acceptance of the goods, so as to take the case out of the operation of the statute of frauds. Bayley, Judge, said: "The buyer can not be considered to have actually received the goods, when they have remained from first to last in possession of the seller." Holroyd, Judge, said, "As long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute." Best, Judge, said, "It was formerly considered that a delivery of the goods by the seller, was sufficient to take a case out of the statute, (that is, the 17th section); but it is now clearly settled that there must be an acceptance by the buyer, as well as a delivery by the seller. The statute enacts that, where the bargain is for something to the value of ten pounds, it shall not bind, unless something unequivocal has been done to show that the contract is complete." Abbott, chief justice, said, "If we held that such a transfer and acceptance were complete in this case, it would seem to follow, as a necessary consequence, that the vendee might maintain trover without paying for the goods, and leave the vendor to his action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying, that this transaction had no such effect." In the case of *Phillips v. Bristolli*, 2 Barns. & Cress. 511, (9 Eng. C. L. R. 162,) the facts showed that, by the conditions of a sale by auction, the purchaser was to pay thirty per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed; a lot of jewelry was knocked off to the defendant, as the highest bidder, and delivered to him immediately. After it remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it; no part of the

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price had been paid : held, it was a question of fact for the jury whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from the one to the other. It was said by the court, in this case, that, "in order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the vendee, with an intention of taking the goods as owner. It lies upon the plaintiff, in this case, to make out that there was such delivery and acceptance." In *Howe v. Palmer*, 3 Barn. & Ald. 321, (5 Eng. C. L. R. 303,) it appeared that the vendee verbally agreed at a public market, with the agent of the vendor, to purchase twelve bushels of tares, (then in vendor's possession, constituting a part of a larger quantity in bulk,) to remain in vendor's possession till called for ; and the agent, on his return home, measured the twelve bushels and set them apart for the vendee: the court held that this did not amount to an acceptance by the vendee, so as to take the case out of the 17th section of the statute of frauds. Abbott, chief justice, said in this case, "there has been no note, in writing, of the contract, and there has been nothing given in earnest, or in part payment ; unless, therefore, the the buyer has accepted and received a part of the goods so sold, this case is within the statute, and no action can be brought on the verbal contract entered into between the parties. The question is, has the buyer accepted? Now, if he had once accepted, he could not afterwards make any objection, even if it turned out that the tares did not correspond with the sample. But it is clear that he had a right to make any objection at the time when they were tendered to him for acceptance. If the defendant, in this case, had gone to the plaintiff's granary to demand the tares, and upon inspection had discovered that they did not correspond with the sample, it is impossible to say that he might not then have made the objection ; and if so, it is clear that there was no acceptance on his part ; I there-

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fore think that this case comes within the words of the statute, to which we ought to give full effect, and not suffer its beneficial provisions to be evaded by subtle distinctions." Bayley, Judge, said, "I think the safest rule to follow is, to adhere closely to the words of the statute." He then commented on the cases of *Chaplin v. Rogers*, in which the jury thought that there was evidence of an actual acceptance, inasmuch as as the vendee had dealt with the hay as his own; and of *Elmore v. Stone*, in which the buyer directed expense to be incurred, and the directing of that expense was considered evidence of an acceptance on his part, and then concludes by saying that he doubts the authority of the decision of the case of *Elmore v. Stone*. In *Proctor v. Jones*, 2 Carr. & Payne, 532, (12 Eng. C. L. R. 249,) Best, chief justice, said, when the case of *Elmore v. Stone* was cited by Serjt. Vaughan, "that case has been overruled." The authority of the case of *Elmore v. Stone* is therefore now much weakened, if not completely overthrown, by the later English decisions. The following were the facts in *Elmore v. Stone*: The plaintiff, who kept a livery stable and dealt in horses, having demanded one hundred and eighty guineas for a pair of horses, the defendant, after offering a less price, which was rejected, at length sent word that "the horses were his, but that as he had neither servant nor stable, the plaintiff must keep them at livery for him." The plaintiff, upon this, removed them out of his sale stable into another stable; this was held a sufficient delivery within the statute of frauds. (1 Taunt. Rep. 458.) This decision, in *Elmore v. Stone*, was nine years after the case of *Chaplin v. Rogers* had been decided. The facts in *Chaplin v. Rogers* were, in substance, as follows: The parties being together in the plaintiff's farm yard, the defendant, after some objections and doubts upon the quality of a stack of hay (particularly the inside part) then standing in the yard, agreed to take it at 2s. 6d. per hundred weight. Soon after, the defendant sent a farmer to look at it, whose opinion was unfavorable. But about two months afterwards, another farmer agreed with de-

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defendant for the purchase of this hay, still standing untouched in the plaintiff's yard: the defendant told the last farmer (Loft was his name) to go there and ask what condition it was in, saying he had only agreed for it, if it were good. The plaintiff then informed Loft it was in a good state: he agreed to give the defendant 3s. and 9d. per hundred weight for it—the defendant having told him that he had agreed to give the plaintiff 3s. and 6d. for it. Loft, thereupon, brought away thirty-six hundred weight; but this latter fact was without the knowledge and against the direction of the defendant. The judges agreed that there was sufficient evidence of a delivery to, and acceptance by, the defendant, to leave the matter to the jury; the jury found for the plaintiff in this case. These two English cases, and the case of *Vincent v. B. & J. Germonds*, in 11 Johns. 283, are relied upon by the plaintiff in error to reverse the judgment of the court below. We find that the strongest English case for him—*Elmore v. Stone*—has been overthrown; that in *Chaplin v. Rogers*, there was some evidence of delivery and acceptance of the stack of hay. Now, in *Vincent v. Germonds*, on a sale of cattle, no earnest money was paid, nor any memorandum in writing made, and the cattle were to remain in the possession of the vendor, at the risk of the vendee, until he called for them, and the vendee afterwards came and took away the cattle without saying anything to the vendor: this was held to be a sufficient delivery within the statute of frauds. But this New York case is not like the one now before us. If, in this case, Kirby had gone to Johnson's in a day or so after the bargain, and driven off the cattle, and Johnson had sued for the price, then the cases would have been similar.

In the case of *Shindler v. Houston*, (1 Comst. Rep. 261,) many of the cases on this subject, both English and American, were examined and reviewed by the court of appeals of New York; and it was held that, to constitute a delivery and acceptance of goods, such as the statute requires, something more than mere words are necessary. Superadded to the language

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of the contract, there must be some *act* of the parties amounting to a transfer of the possession, and an acceptance thereof by the buyer. I concur in the language of Wright, Judge, in this case, in which he says: "I think I may affirm, with safety, that the doctrine is now clearly settled, that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer; and that this delivery and acceptance can only be evinced by unequivocal acts, independent of the proof of the contract."

In the case now before us, it can not be pretended that Johnson had parted with his lien upon the cattle for the purchase money. There was no act done after the sale, amounting to a delivery of the oxen by Johnson to Kirby, and an acceptance by Kirby of the oxen from Johnson; that is, there was no delivery by the vendor, with an intention of vesting the right of possession in the vendee; and there was no actual acceptance by the vendee, with the intent of taking possession as owner. If the courts of the country should decide that such facts as appear in evidence in this case are sufficient to take it out of the statute of frauds, then it is difficult to find what will come within that statute. Nay, we had better blot the statute from our books at once, and not fritter away its vitality by constructive deliveries and acceptances.

Judge Scott concurring, the judgment below is affirmed.

PERRY AND OTHERS, Appellants, v. CALVERT AND OTHERS,
Respondents.

1. A. makes a fraudulent conveyance of land. A judgment is subsequently recovered against him, and the land is sold under an execution, and B. becomes the purchaser, who afterwards conveys back to A., who then conveys to C., who has notice of the facts. *Held*, that as A. could not have obtained equitable relief against his fraudulent deed, neither can his grantee with notice.

Perry v. Calvert.

Appeal from Platte Circuit Court.

Petition by C. A. & E. H. Perry against Lewis Calvert, Simeon L. Stewart and Malinda Stewart, his wife, praying to have a deed set aside and cancelled.

The petition stated that on the 10th of November, 1843, Simeon L. Stewart entered at the land office in Plattsburgh a tract of land to which he had a preëmption right, and on the next day conveyed the same to the defendant, Calvert, in trust for his wife, Malinda Stewart, during her life, and at her death to go the heirs of her body begotten by him; that the patent for said land issued to said Simeon on the 1st of April, 1846, long after said conveyance; that said conveyance, having been executed and delivered before the patent issued, was null and void under an act of congress, and furthermore, that it was executed in fraud of the creditors of said Simeon, he being largely indebted at the time, and having no other property; that on the 7th of April, 1846, a judgment was recovered by James H. Stewart against said Simeon, upon which an execution issued, under which said land was sold, and James H. Stewart became the purchaser, and afterwards received from the sheriff a deed; that on the 8th of July, 1847, said James H. Stewart, for a consideration of \$200, sold and conveyed all his right, title and interest in said land to said Simeon L. Stewart; and that on the 7th of May, 1853, said Simeon, for a consideration of \$1600 previously paid, executed and delivered to plaintiffs a deed for said land, with a relinquishment of dower by his wife, Malinda.

Upon these facts, the plaintiffs prayed that the deed to Lewis Calvert might be set aside and cancelled.

The defendant, Calvert, filed a demurrer to this petition, which was sustained by the Circuit Court.

Abell & Stringfellow, for appellants. 1. The deed from Simeon Stewart to Calvert before the patent issued, is void (4 U. S. S. p. 496, ch. 9, p. 420, 678; 5 U. S. S. 251, 382, 453, 456.) 2. The demurrer admits that the deed is void as

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to creditors, and of course it was a nullity against the title acquired by James H. Stewart under the execution sale. James H. Stewart, having acquired a good title, had a right to dispose of it to anybody—to Simeon, who had made the fraudulent deed, as well as to others; and by that purchase, Simeon acquired a good title against his own previous deed. But whether good in the hands of Simeon or not, when it passed from him to the plaintiffs, they certainly acquired all the title of James H. Stewart. (2 Hawks, 535; Supp. to U. S. Dig. tit. "Estoppel.")

H. M. Vories, for respondent, that the plaintiffs could not set up the fraud of Simeon Stewart as a ground of relief; cited 13 Mo. Rep. 151; 8 Conn. Rep. 312; 3 Pick. 56; 7 Greenleaf, 96; 3 A. K. Marsh. 65, 474; 3 Paige, 154, 6 Barb. S. C. Rep. 380; 2 Lead. Cases in Equity, part 11, p. 99, 131.

LEONARD, Judge, delivered the opinion of the court.

"All writers upon our law agree that no polluted hand shall touch the pure fountains of justice." This principle, to be found in every system of jurisprudence, would be sufficient to dispose of the case if Simeon Stewart were the party applying here for the relief instead of his grantee. He could not be allowed to ask a court to annul his own conveyance on the ground that he violated the preëmption laws of the United States in making it, or because his purpose was to defraud his creditors. No man can make his own iniquity a foundation for legal redress. Lord Mansfield states the matter thus, in *Holman v. Johnson*, (Cowp. 343): "The principle of public policy is, *ex dolo malo non oritur actio*—no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise "*ex turpi causa*," or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid

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to such a plaintiff. And to the same effect is the maxim of the Roman law, "*nemo ex proprio dolo consequitur actionem.*"

It is supposed, however, that the present case would not fall within this principle, even if the suit were in the name of the original party, because the title now sought to be enforced did not originate in the illegal act, but is paramount to it, and that therefore it ought to prevail when subsequently acquired by the original party, *even in his hands*, against his own previous iniquity; and that however this might be, in reference to the original party, and although *he*, upon acquiring this title, might be personally bound by this moral estoppel from setting up his own immorality, yet that the title is purged of this taint when it passes again from him into the hands of a purchaser for value, although with notice of the fact. We do not concur in this view of the matter. Certainly, the party himself would be bound by the estoppel, so far at least that he would not be allowed to set up his own iniquity as a ground of relief. This is settled by precedent, and is clearly right on principle. (*Schutt vs. Large*, 6 Barb. S. C. Rep. 373.) And we do not think the case is altered by the mere fact that the plaintiff here is a grantee of the original party, standing in a court of justice and asking its active interference to set aside his own grantor's iniquitous conveyance, in order that he may have the benefit of the purchase he has made from him. If he were an innocent purchaser, *without notice*, his case would certainly be entitled to a different consideration; but that is not the case made in his petition, and which has been passed upon by the Circuit Court. It is true, he expressly avers that he is a purchaser for value, but does not pretend that he bought without notice of the matters set up as the grounds of relief; and as his grantor's prior deed was duly registered, there is no reason to suppose that such was the fact—if, indeed, the registry would not conclude him in that respect. These principles dispose of the case as it now stands, and result in affirming the judgment of the Circuit Court upon the demurrer.

They leave, however, untouched the question, whether, in a

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suit at law, by the present plaintiff against the trustee, to recover the possession of the land, he would be allowed to set up these matters as an answer to the trustee's title. This is probably the question upon which the parties desired the opinion of the court; but it is not necessarily involved in the decision of the present case, and we decline expressing any opinion upon it. It is sufficient that the plaintiff, even upon his own showing, is not entitled to the relief he asks.

Judgment affirmed.

HUNTINGTON AND WIFE, Appellants, v. HOUSE, Respondent.

1. In a suit by husband and wife under the practice act of 1849, the affidavit of the husband is a sufficient verification of the petition.
2. It is too late to object to the verification of a petition when the case is called for trial.

Appeal from Weston Court of Common Pleas.

Action for slander and malicious prosecution, brought by Huntington and wife against House. The petition was verified by the affidavit of Huntington for himself alone. The defendant answered. When the case was called for trial, the defendant moved to dismiss the suit as to the wife of Huntington, because the petition was not sworn to by her, nor her agent or attorney. The motion was sustained. The plaintiffs excepted, and, after a nonsuit submitted to by Huntington, appealed to this court.

H. M. Vories, for appellants, insisted that the verification by the affidavit of the husband was sufficient, and that, if not, the objection came too late. (Practice Act of 1849, art. 7, § 2. *Alfred v. Watkins*, 1 N. Y. Code Rep. 343-412, N. S.)

LEONARD, Judge. The judgment here must be reversed and the cause remanded. The affidavit of the husband was a sufficient verification of the petition. The objection, too, if other-

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wise well taken, ought not to have been allowed on the calling of the cause for trial. No purpose of justice can be answered by allowing a party, who has thus far waived the objection, to come forward with it at that late hour. The judgment is accordingly reversed, and the cause remanded.

AGEE, Plaintiff in Error, v. AGEE'S ADMINISTRATOR, Defendant in Error.

1. An ante-nuptial agreement provided that the future wife, at the death of her husband and herself, should have "at her disposal, to dispose to her son James," certain personal property. *Held*, that the wife had a mere power of appointment; that in no case could she have any claim in her own favor against her husband's estate, growing out of this ante-nuptial agreement.

Error to Chariton Circuit Court.

This was a demand presented in the county court by Catharine Agee, (formerly Catharine Worsham,) for allowance against the estate of John M. Agee, her deceased husband. The demand was founded upon the following agreement, executed by said John M. Agee immediately before his marriage with the plaintiff:

"Chariton county, Mo., February 15, 1853.

"This bond is to insure to Mrs. Catharine Worsham in having, at her death and mine, at her disposal, to dispose to her son, James Worsham, one bed and bed furniture, ample sufficient, and also one leather covered trunk, if he, the said James Worsham, is living, and also four hundred dollars from my estate. In return, I, John M. Agee, take in possession all her bonds and money and other property for my and said Catharine Worsham's own use and benefit during our life-time, for which I bind myself, my heirs, administrators and executors to pay the same out of my estate. Given under my hand and seal this 15th day of December, 1853.

"JOHN M. AGEE, (seal.)

One defence relied on by the administrator below was, that he had acquired any right of action which the plaintiff had under this agreement by virtue of an assignment from her of "all her property, real, mixed and personal, that she was then or thereafter might be entitled to *as the widow of the late John M. Agee, deceased.*"

There was a judgment for the defendant in the county court, and in the Circuit Court on appeal, and the plaintiff brings the case here by writ of error.

Gardenhire, for plaintiff in error, insisted that the agreement was valid and would be upheld, and cited 15 Mass. 106; 4 B. Monroe, 380; 17 Conn. 201; 4 Barb. S. C. Rep. 546; that it vested a life estate in the plaintiff, with power of disposal at her death to her son James, if living; and that, whether living or dead at the death of his step-father, was immaterial; and that the assignment to the defendant of the property to which she was entitled as *widow* did not pass any property to which she was entitled under the agreement, and upon this point, cited 4 Watts & Serg. 546; 4 B. Monroe, 380.

J. W. Morrow and *J. B. Clark*, for defendant in error.

1. The agreement created no demand in favor of the plaintiff against her husband's estate of which the county court had jurisdiction.
2. It was a power of appointment which could not be exercised until the plaintiff's death, and which did not bind the estate until it was exercised.
3. The plaintiff's right to dispose of the property depends upon the survivorship of James Worsham, and the record does not show whether he is living or dead.

LEONARD, Judge, delivered the opinion of the court.

Questions of this character usually arise upon the construction of wills; and if the present instrument were testamentary, it would confer only a naked authority upon the intended wife to appoint at her death to her son, if then living, the money and property indicated in it, to take effect out of the husband's estate after his death, and would vest no property in herself.

It is settled that, if a person have a general power of appointment over property, without limitation as to the appointee, and actually exercise the power by deed or will, the property appointed will form part of *his assets*, and be liable to the claims of creditors in preference to the claims of the appointee. But it is otherwise, if it be a particular power for third persons, designated in the power. But even in the case of a general power of appointment, the property is not considered as belonging to the donee of the power, even in favor of creditors, until he has executed the power, or done some act indicating an intention to execute it. Equity, it is said, will, in certain cases, aid the defective execution of the power, but will never supply the total want of execution. Although the money, which a party possessing a general power has a right to raise, may be considered as his property; yet a party, to be affected by the execution of the power, ought only to be charged in the manner and to the extent limited at the creation of the power.

The courts, even in favor of creditors, only direct the application of the money raised under the power, and hold it, when raised, to be assets for the payment of debts, although otherwise appointed by the donee of the power; but they do not, by their own act, charge an estate, and supply the want of the execution of the power, which would be destroying all distinction between power and absolute property. (4 Kent's Comm. 359, 360; *Lassetts v. Cornwallis*, 2 Vern. 465; *Holmes v. Coghill*, 7 Ves. 506; 12 Ves. 206; 2 Sug. on Powers, 172.)

"Powers," said Lord Chief Justice Wilmot, (Wilm. 23,) "are never imperative. They leave the act to be done at the will of the party to whom they are given. Trusts are always obligatory upon the conscience of the party entrusted." In *Brown v. Higgs*, (8 Ves. 574,) Lord Eldon said: "There is not only a mere trust and a mere power, but there is also known to the court a power which the party to whom it is given is entrusted, and required to execute." And then goes on to remark, "if the power is a power which it is the duty of the party to execute, he is a trustee for the exercise of the power."

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The court adopts the principle as to trusts, and will not permit his negligence to disappoint the interests of those for whose benefit he is called upon to execute it. When, however, the expressions used are such as confer only a power on the donee, and the application of the property to the person designated is left entirely at his discretion, no trust will be created."

In *Bull v. Vardy*, (1 Ves. jr. 270,) the testator empowered his wife to give away at her death one thousand pounds—one hundred of it to A. and one hundred to B., the rest to be disposed of by her will. The wife died without having made any disposition of the fund, and in a suit by A., claiming the hundred pounds, it was held that this was no absolute legacy to A., but a naked power in the wife.

If we apply these principles to the present instrument, which is the most favorable view that can be taken of it for the person interested in the power, it can only be considered an agreement on the part of the husband to the effect indicated, which, upon his death, and the due execution of the power by the wife, the courts would enforce against his estate in favor of the son. No appointment, however, has been made, and this plaintiff has but a naked authority to appoint in favor of her son, and therefore, no matter what construction may be put upon her contract with the defendant, *she* has no demand to be allowed in *her* favor against the estate growing out of this ante-nuptial agreement.

Judge Ryland concurring, let the judgment be affirmed.

MESSERSMITH, Defendant in Error, v. MESSERSMITH AND
OTHERS, Plaintiffs in Error.

1. A court of equity never lends its aid to enforce a forfeiture.
2. Where there is a breach of an express condition in a deed, the remedy of the grantor is by an entry and a suit at law, if necessary, to recover the possession; and the remedy of the grantee, or his heirs, is by a suit in equity to be relieved against the forfeiture upon making a just compensation, if a proper case for equitable relief exists, or perhaps by setting up this matter as a defence when sued at law for the possession.

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3. A mother conveyed land to her son, upon an express condition inserted in the deed, that he should provide for her maintenance during her natural life. The son having maintained his mother many years, died without making any express provision for her by will or otherwise, but leaving ample means for her maintenance, which his representatives offered to apply to that purpose; *held*, that if there was any breach of the condition, it was a proper case for equitable relief against a forfeiture.

Error to Cole Circuit Court.

Petition by Elizabeth Messersmith, the grantor, against the heirs of Hiram Messersmith, the grantee, praying the annulment of a deed and the restoration of the land conveyed, for the non-performance of a condition inserted in the deed.

The petition stated that the plaintiff, in 1836, executed and delivered to her son Hiram, a deed for certain land, which was subject to a condition therein written, that the said Hiram should provide for her a good and sufficient maintenance during her natural life; and if he should at any time refuse or fail to provide the said maintenance, then said deed was to be void and of no effect, and in that event the plaintiff reserved to herself the right to re-enter and take possession of the land; that said Hiram took possession of the land, and continued in possession until his death in 1852; and that he died intestate, without making any provision for her support and maintenance during the remainder of her life.

Judgment by default was rendered against the adult defendants, and a guardian *ad litem* was appointed for the minors, who filed an answer, setting up, among other things, that the grantee, during his life, had performed all things required of him by the condition of the deed, and that his administrator, since his death, was willing and had offered to perform the condition, but that the plaintiff had refused to permit him to do so. The answer also prayed compensation for the maintenance of the plaintiff by Hiram Messersmith during his life, and for improvements made by him on the land, in case the deed should be annulled and the title of the heirs divested. The administrator of Hiram Messersmith also filed an answer set-

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ting up the same matters. Both of these answers were stricken out on motion, and a final judgment was entered, vesting the title to the land in the plaintiff. The defendant brought the case here by writ of error.

M. M. Parsons, for plaintiff in error. 1. The Circuit Court erred in striking out the answers. They contained both a legal and an equitable defence to the action. (2 Verm. 366; 2 Story, 24; 5 Georgia, 341.) 2. The right to perform the conditions of the deed descended to the heirs and legal representatives of the deceased, whose rights were not defeated by the death of their ancestor. (2 Cruise's Dig. 28-32; 4 Kent, 130.) 3. There was no breach of the condition of the deed. (2 Cruise's Dig. 28-32; 24 Wend. 146; 4 Cushing, 184; 1 Hilliard on Real Property, 367, 380; 4 Kent, 134.) 4. The court had no power to render judgment against the infants. After the answer by their guardian was stricken out, they were no longer before the court.

Gardenhire, Morrow and Edwards, for defendant in error. 1. The condition having been broken, the grantor had a right to re-enter. (1 Bacon's Abridg. tit. condition, 632; 2 Flintoff on Real Property, 228-9; 1 Reeves' Eng. Law, 294; 3 Reeves' Eng. Law, 337; 5 Viner's Abridg. 41, (A. 2); 1 Preston on Estates, 48; 5 Pick. Rep. 528; 3 Harr. & McH. Rep. 182; 5 Ohio Rep. 387; 2 Plowden Rep. 412; 8 Blackf. 138; 4 Kent's Comm. (8th ed.) 130.) 2. The grantee having died without performing the condition, the right to perform it is not transmitted to his heir. (2 Greenleaf's Cruise, 28.) 3. A part performance of a condition subsequent is no bar to the right of re-entry. (7 Watts, 144; 7 Greenl. 225; 2 Fairf. 235; Gill's Rep. 395.) 4. The answer of the infant defendants was properly stricken out; for, if every part of it had been proved, it could not have defeated this action.

LEONARD, Judge, delivered the opinion of the court.

Without stopping to remark upon the irregularity, occurring in the proceeding, of giving judgment against infants by

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default, for want of an answer, we proceed at once to dispose of the case upon its merits. Here is an estate in land subject to be divested upon the non-performance of an express condition mentioned in the deed, that "the grantee should provide for the grantor a good and sufficient maintenance during her natural life;" and the grantee having died intestate without making any provision for her support, she asks the court in the exercise of its equitable jurisdiction to enforce the penalty by directing the deed to be cancelled and the land to be restored to her. The answer to this is, that a court of equity never lends its aid to enforce forfeiture under any circumstances; (*Livingston v. Tompkins*, 4 Johns. Chan. Rep. 415;) and as we can not consider this a proceeding at law to recover the possession of the land upon the legal title that would have reverted to the plaintiff upon an entry for the breach of the condition, the judgment must be reversed and the petition dismissed.

In order however that the matter may be properly and finally settled between the parties, in any future proceeding that may be instituted for that purpose, we remark, that for any breach of the condition, the remedy of the grantor is in her own hands, by an entry and a suit at law, if necessary, to recover the possession; and the remedy of the heirs is by a suit of equity to be relieved against the forfeiture, upon making a just compensation, or perhaps, by setting up this matter as a defence, when sued at law for the possession upon a breach of the condition. But, however this may be, the party will, in one way or the other, be relieved against the forfeiture incurred by the breach of a condition, if a proper case for equitable relief exist. In an early case, *Peaety v. Somerset*, 1 Strange, 447, it is said: "The true ground of relief against penalties is from the original intent of the case, and the court gives him all that he expected or desired; it is the recompense that gives the court a handle to grant relief." In other words, the ground of equitable interference is, that we ought to presume the object of entering into the contract was its fulfilment, and not an infliction of an injury on one side, nor the acquisition of a

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collateral advantage on the other ; and that when this object is frustrated, the intention of the parties will be best carried out by substituting an equivalent in its stead, and not by enforcing a recovery which is excessive in value and different in nature ; and relief, we believe, is never denied, where the breach is accidental and without fault, and admits of compensation. (*Livingston v. Tompkins*, above cited ; *Popham v. Barnfield*, 1 Vern. 89 ; *Carey v. Bertie*, 2 Vern. 339.)

If a breach of the condition has been incurred here, merely by the grantee's dying without making any provision by will for the support of his mother, although leaving ample means for that purpose, which his representatives have offered to apply accordingly, and which she declines receiving, (which we are not now called upon to determine,) it is very clear that it should not be imputed to the fault of the party, and that equity would compel the party to accept a compensation in lieu of the forfeiture.

Judge Ryland concurring ; the judgment is reversed and the petition is dismissed.

MORGAN, Defendant in Error, v. COX, Plaintiff in Error.

1. Any negligence in the performance of what is lawful which causes loss to another, is an injury which confers a right of action.
2. The reasonable care which persons are bound to take in order to avoid injury to others, is proportionate to the probability of injury that may arise to others. He who does what is more than ordinarily dangerous, is bound to use more than ordinary care.
3. Where injury to another is caused by an act that would have amounted to trespass *vi et armis* under the old system of actions, as where one by the negligent handling of a loaded gun kills another's slave, it is no defence, it would seem, that the act occurred through inadvertence, or without the wrong-doer's intending it ; it must appear that the injury done was *inevitable*, and utterly without fault on the part of the alleged wrong-doer.

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Error to St. Clair Circuit Court.

Action to recover in the form of damages the value of plaintiff's slave, alleged to have been killed by the accidental discharge of a gun in the hands of the defendant, a minor, by reason of his negligence. The defendant answered by his guardian *ad litem*, denying the negligence. The facts sufficiently appear in the opinion of the court. There was a verdict and judgment for the plaintiff below, and the defendant brings the case here by writ of error.

F. P. Wright, for plaintiff in error, cited 12 Pick. 177; 6 Shepley, 32; 11 East, 60; 2 Pick. 621; 2 Taunt. 314; 18 E. C. L. Rep. 437; 243 C. L. Rep. 391; 2 Iowa Rep. 462.

Gardenhire, for defendant in error, cited Ward v. Weaver; Hobart, 390; 9 Mo. Rep. 738; 4 McCord, 161; 1 Dev. 185; 6 Mon. 337; 2 Miles, 298.

LEONARD, Judge, delivered the opinion of the court.

(We see no grounds for disturbing this judgment. The suit was for the negligent shooting of the plaintiff's slave, and the only question was as to the fact of negligence. The defendant it seems had been out with his gun, and was asked by the plaintiff to aid him and his servant in driving an unruly cow across the Osage river; and while doing so he punched the cow with his loaded gun, and in replacing it across his horse, the hammer struck the saddle as he supposed and caused it to fire, by which the plaintiff's servant was shot and killed.

✓ The court directed the jury, that if the killing, although unintentional, was occasioned by the negligence of the defendant, he was liable; and also instructed, at the instance of the defendant, that if the gun were discharged while the defendant was replacing it across his horse, he was not liable, unless the firing was occasioned by his negligence in replacing it; but refused to tell the jury, that if it were thus discharged and not

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while it was being used in punching the cow, the fact of its having been thus used did not render the defendant liable.

We think the jury were so instructed, as to the law of the case, as to leave the defendant without any ground of complaint; indeed the matter was submitted to the jury quite as favorably for him as the law would permit. The plaintiff put his right of recovery upon the ground of negligence, and the jury were told, that if it appeared from the evidence that the defendant had been guilty of it, they must find for the plaintiff; and ordinarily this would seem to be a sufficient direction, that they could not so find unless the proof satisfied them of the required fact. Here, however, the court, at the instance of the defendant, also directed, that if the accident occurred while the gun was being replaced across the horse, they must find for the defendant, unless the act was done negligently, and without taking proper care. The refused instruction, as to the effect of the previous act of punching the cow upon the subsequent firing, was quite unnecessary for the defendant, except to lead the jury astray; for the court had already said, that if the event occurred while the gun was being replaced, the defendant was not liable, unless he were guilty of negligence in replacing it; which was going to the very limit of the law, in that particular, for the defendant.

We are also satisfied, that there was quite enough evidence of negligence, to submit the case to the jury; and if we were called upon to express an opinion upon it, we should not hesitate to say, that it well warranted the verdict. If a person be guilty of an unlawful act, he is responsible for all the damage that is thereby occasioned to others. But here, it is true, the defendant had an undoubted right to carry his loaded gun about with him; and, therefore, that alone did not render him responsible for the private damage that resulted from it to the plaintiff, or answerable criminally for the destruction of human life that was thereby occasioned. Upon legal principles it must be, that to the extent to which one person has a right to act, others of course are bound to suffer; and any damage

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that may accrue to them, while he is thus exercising his rights, affords no valid ground of complaint. The loss occasioned in such cases, is "*damnum absque injuria*." Every person, however, who is performing an act, is bound to take some care in what he is doing. He can not exercise his own indisputable rights without observing proper precaution not to cause others more damage than can be deemed fairly incident to such exercise. "*Sic utero tuo, ut alienum non laedas*." And, therefore, although the mere exercise of a right is not a wrong in any case, any negligence in the exercise of it, that causes a loss to another, is an injury, conferring upon him a right of action. It is correctly said, that generally between persons standing in no particular relation to each other, that alone is reasonable care, which, in the judgment of men in general, is proportionate to the probability of injury to others; and consequently, he who does what is more than ordinarily dangerous, is bound to use more than ordinary care. The defendant here had a dangerous instrument in his hands, and it was his duty to take proportionate care in handling it. The punching of the cow was a careless use of it, surrounded as he was by others; and although the accident did not then occur, it was no doubt occasioned by accidentally striking the hammer against the saddle, upon returning the gun to the horizontal position which the defendant had carried it without elevating the muzzle. The accident, in all probability, would not have occurred had the defendant taken that care of the gun that it was his duty to have taken of it while it was loaded, and he himself was surrounded by those whom it might injure if it accidentally fired.

We have thus stated how far a party ought to be held responsible upon the principles of law applicable generally to damage occasioned by negligence, which seems to be the ground upon which the plaintiff here placed his right of recovering. It must however be admitted, that our law holds a person to a much stricter responsibility when the act amounts to a trespass *vi et armis*, either to property or person. Under the old system of

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actions, it was no defence, in such cases, that the act occurred by misadventure, and without the wrong-doer's intending it, but the defendant must have shown such circumstances as would make it appear to the court that the injury done to the plaintiff was *inevitable*, and the defendant was not chargeable with any negligence; for no man should be excused of a trespass, unless it may be adjudged *utterly without his fault*. This was so determined in an old case, (*Weaver v. Ward*, Hobart, 134,) where the action was against a soldier who had accidentally shot his comrade while exercising; and in *Underwood v. Hewson*, (*Strange*, 596,) the defendant was uncocking his gun, when it went off and accidentally wounded a bystander, and the defendant was charged and holden liable in trespass. And in *Cole v. Fisher*, (11 Mass. Rep. 137,) it is said, that this decision has never been questioned.

The facts of the present case would, under the former system of procedure, have supported an action of trespass, and can not, we think, be distinguished from the cases cited. In one of them, the party in uncocking his gun accidentally discharged it and wounded a bystander. Here, the defendant accidentally struck the hammer of his gun against his saddle, and the same result ensued. In both cases it was upon the defendants to show, that it happened, as the books say, by inevitable accident, and without the least fault; and the change that has been introduced by the new code in the remedy, has not changed the rules of law as to the liability of the parties. It is enough, however, that, under any view of the law, the defendant was clearly liable for this damage. In the case cited from the Massachusetts Reports, the defendant, after washing his gun, went to his shop-door, which was about a rod distant from the highway, and discharged it for the purpose of drying it; and the plaintiff's horse, being at the time harnessed to his chaise, and fastened by his bridle to the fence on the opposite side of the road, was frightened and ran away, and broke the chaise, and the defendant was held answerable for the damage, either in trespass or case, according to the other circumstances

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of the transaction. In *Lynch v. Nurdan*, (2 Stephens, Nisi Prius, 1017,) which was an action for an injury to a child, committed by the defendant in leaving his horse and cart standing alone in a street, into which some children had got, and, teasing the horse, the cart went over the plaintiff and broke his leg; Durham, Chief Justice, before whom the case was tried, held the defendant liable, and said: "If a man were guilty of negligence in leaving any thing dangerous in a street, and an injury arose, though partly by the conduct of other parties, the sufferer unquestionably had a right to recover. If a game-keeper, returning home from his duty, were to leave his loaded gun in a play-ground, and one of the boys should fire it off and injure another, it could not be doubted but that the game-keeper must answer in damages to the injured person." I recollect myself a case that occurred, where a person in riding through the streets of one of our villages with his loaded rifle before him, lying horizontally across his saddle, it accidentally fired and wounded a person sitting in his own door, and no doubt seemed to be entertained of the responsibility of the party for the damage that resulted. The judgment is affirmed.

ARTHUR, Plaintiff in Error, v. WESTON and STRODE, Defendants in Error.

1. A conveyance of real estate to W. W. P. & Co., only operates to transmit the legal title to W. W. P.

Error to Jackson Circuit Court.

This was an action in the nature of ejectment for the possession of certain lots in Independence. Both parties claimed under Azariah Holcomb, who, by deed, dated December 29, 1832, conveyed said lots to "W. W. Phelps & Co." On the 11th of January, 1838, W. W. Phelps, Oliver Cowdry and John Whitmore conveyed to the plaintiff.

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The defendant, Strode, claimed title by regular conveyances, under an execution sale in 1835, upon a judgment against W. W. Phelps and Oliver Cowdry.

At the trial before the court without a jury, the plaintiff offered to prove that at the date of the conveyance from Holcomb to W. W. Phelps & Co., said firm was composed of Phelps, Cowdry and Whitmore; but this evidence was excluded, to which the defendant excepted. The court below declared the law to be, that the deed to W. W. Phelps & Co. operated to vest the legal title in W. W. Phelps only, and that the entire title passed by the sheriff's deed under the execution sale, and was vested in the defendant, Strode, and gave judgment accordingly.

The plaintiff brought the case here by writ of error.

Adams, for plaintiff in error; that the deed to W. W. Phelps & Co. vested the legal title in the parties composing the firm, cited 4 Kent, 462; 1 American Lead, cases, 336, 341; 1 Brock. 463; Story on Partnership, § 101; 2 Brock. 150.

Hicks and Bone, for defendants in error, cited 4 Mass. Rep. 424; 3 Sumner, 435, 470, 471; 2 Johns. cases, 321; Jackson v. Sisson, 9 Johns. Rep. 73; Jackson v. Carey, 8 Johns. Rep. 385; Cole v. Cole, 15 Johns. 159; 3 Kent's Comm. (6th ed.) p. 37, 38; Bacon's Abridg. tit. Evidence, letter G. tit. Grants, letter C.; Story on Partnership, (3d ed.) § 92.

LEONARD, Judge, delivered the opinion of the court.

The question here is, whether the deed from Holcomb to W. W. Phelps & Co. can be allowed to take effect as a legal conveyance of the land to Phelps, Whitmore and Cowdry, the persons composing the partnership, upon parol proof of that fact, and we think it can not. The question, it is to be observed, is as to legal rights, and not as to the equities of the parties; and we may further observe, it is not merely whether the grantor intended to convey to the persons composing the firm, but whether the partnership style is as a matter of law a good

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name of purchase, in a conveyance of real property, sufficient to pass the legal title to all the individuals of the firm. It is thus seen, that this is not altogether a question of intention, but mainly a question of law; not whether the grantor intended to convey the lot to Phelps, Whitmore and Cowdry, but whether these three persons are sufficiently, in point of law, designated in the deed as the grantees by the name or description of "W. W. Phelps & Co." A conveyance of real property being required by the statute to be put in writing, the party who is to take as grantee must be sufficiently ascertained by the written instrument, or it is a nullity so far as it purports to effect a transfer of the legal title. It is obvious, however, that the parties may be described with various degrees of certainty; and the question here is, what is a sufficient description, in this respect, in a conveyance of real property? The highest degree of certainty was probably obtained by the ancient feoffment, where the parties and the land were all present, and the land conveyed was delivered by the grantor into the possession of the grantee. In the ordinary transactions of life, however, individuals are usually and sufficiently designated by their proper names, and these in our law are deemed sufficient in all legal transactions, without any further description. This however seems to have been otherwise in ancient Egypt, as appears by a deed made two thousand years ago, and recently found in Upper Egypt, in a tomb by the side of a mummy, probably that of the owner, where the parties are identified not only by their names, but by a minute description of their persons—the seller, as "aged about forty-five years, of middle stature, dark complexion, handsome person, bald, round-faced and straight nosed;" and the purchaser, as "aged about forty years, of middle stature, yellow complexion, cheerful countenance, long face, and straight nose, with a scar upon the middle of his forehead." (4 Kent's Com. 8th ed. 513.)

But, however this may be elsewhere, it is certain that, under our law, the parties, even to a legal conveyance of real property, may be identified either by their names, without any further

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description, or by matter of description only. In Shepherd's Touchstone, (title "Grant," p. 235, 236, 237,) it is said: "If the grant be by deed, the grantee must be sufficiently named, or at least set forth and distinguished by some circumstantial matter, and that he be so named or described as that he may be capable by that name whereby he is set forth. Regularly, it is requisite that the grantee be named by his names of baptism and surname, and so it is most safe; and yet if the grant do not intend to describe the grantee by his known name, but by some other matter, then it may be good by a certain description of the person, without either surname or name of baptism. And therefore, a grant to the wife of J. S., or to the first son, or the second son, or the youngest son, or to all the sons, or all the daughters, or to all the children, or to all the issue of J. S., or to the next of blood of J. S.; in these cases, grants made to these persons in these words are good, for the person is certainly enough described. But if a grant be made to the parishioners or inhabitants of Dale, or to the good men of Dale, or to the commoners of such a waste, or to the lord and his tenants, bond and free, these are not good grants; for albeit these persons are capable, they are not capable by these means, (for want of identity or that certainty which the law will allow to be tried)." So it is said (3 Bac. Abr. title "Grants," letter C, p. 378 & 379): "A grant to George, Bishop of Norwich, when his name is John, or to Henry, Earl of Pembroke, when his name is Robert, is good; for there can not be more persons of those names. A grant to an Abbot, by the name of the foundation without his name of baptism, is good, if there be not any more Abbots in England of the same name of foundation. If a grant be made to a father and his son, he having but one son, the grant is good, for the apparent certainty of it; but if the father have several sons, it is void, for uncertainty." In Jackson v. Sisson, (2 Johns. cases, 321,) the patent was to three persons by name, "for themselves and their associates, being a settlement of Friends, on the west side of Seneca Lake; to have, and to hold,

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for themselves and their associates"—and the question being as to the legal title, Kent, Justice, said: "There was no legal estate created by the patent but what vested in the three patentees named. The description of the association by the words, "a settlement of Friends, on the west side of Seneca Lake," was too vague and uncertain to constitute a competent grantee at law, or a cestuique use, whose estate the statute would transfer into possession. (Saunders on Uses, 63, 128.) It (the patent) is to J. P., W. P. & T. H., for themselves and their associates, being the settlement aforesaid; and, therefore, from the words of the grant, as well as from the uncertainty of the description, it is evident that the associates had only an interest in equity, and that Parker, and the others, were vested with the legal estate as trustees for the association."

We repeat, the only question in the present case is, whether the description the deed gives of Phelps, Whitmore and Cowdry is of "that certainty which the law will allow to be tried," so as to constitute these persons competent grantees in a legal conveyance of real property. The objection here is not to the admission of the parol proof, merely as such; for such evidence is admissible, to some extent, to determine the application of every written instrument. It is always received to show the correspondence of the parties claiming, and the thing claimed, with the description given of them in the deed. The descriptive matter, whatever it may be, must be in the deed, or in some other written instrument to which the deed refers; but the evidence, that a particular person or thing answers to the description, is necessarily by parol. To this extent, we must always look outside of the instrument, to ascertain what is meant by it. Neither does the objection here turn merely on the fact, whether or not it be possible, by means of the description, to ascertain the persons intended. That was possible in several of the cases referred to, especially in the New York case; for the Judge there admits, that although the description given would be insufficient as a legal description of the persons to take as the grantees of the legal estate, they were yet sufficient

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to create a valid trust in favor of the same persons, and that under the instrument the three grantees held the legal estate in trust for their associates. In a case from Maine, (*Beoman v. Whitney*, 20 Maine Rep. 420,) this question as to the effect of a deed to Whitney, Watson & Company, came up collaterally, and the court said, "who Whitney and Watson were is well known, and was proved in the case. If the other persons embraced under the general term, Company, could not take as grantees, Whitney and Watson who were named could, and thus they would hold for themselves and in trust for those associated with them, and this is sufficient to give operation to the conveyance." By reference to the adjudged cases, it is seen what matter of description the law deems equivalent to a proper name in designating the parties to a conveyance. In all of them it was of those particulars by which the persons were quite as well known in their neighborhoods as by their proper names, and which of course were of as easy proof; and in some of them the parties were better known by the description than by their names. Such, however, we do not think is the character of the present descriptive matter. There may be, and no doubt are, many cases in which persons would be quite as readily known in their neighborhoods by their partnership's style as by their proper names; but it is quite evident, that in other cases, especially if the partners were numerous, or any of them were dormant, it would be a matter of no little trouble, and of a good deal of uncertainty at least, to ascertain who were the persons that really took under the description.

It is a matter of great interest to the country, that its land titles should be kept as free as possible from uncertainty. For this purpose, the law has required them to be put in writing, and in order to give them publicity, has also required that they be put upon a public registry. That these provisions may be effectual for the purposes for which they were intended, the rules of the common law, as to the designation of the parties, must be maintained in their vigor. None of the adjudicated cases go to the length that we are now asked to go, and we

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think the public good forbids such a relaxation of the common law rules upon this subject. The case of *Hoffman v. Porter*, (2 Brock, 158,) to which we have been referred, does not go the length of the present case, and besides the decision was made on the circuit, and given with great hesitation by the eminent Judge who made it. The case was treated as a deed to the father, and that one of his sons that was in partnership with him, which was deemed a sufficient designation of the particular son intended, and may be likened to the case of the deed to A. and his son (Cro. Jac. 374), where the uncertainty as to the son was removed by proof that the party had but one son.

We must not, however, be misunderstood; our present decision refers to the transfer of the legal estate only, and does not touch the equitable rights of the parties growing out of the transaction. It is not to be extended to the disposition of personal property, nor are we to be understood as declaring, that the same rule would be applicable to a devise of real property; but the point decided is confined to the very case now before us—a legal conveyance *inter vivos* of real property.

Judge Ryland concurring, the judgment is affirmed.

WELLS, Appellant, v. THE CITY OF WESTON, Respondent.

1. The legislature can not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits.

Appeal from Weston Court of Common Pleas.

This was a petition filed by John B. Wells to set aside a sale of his land, made under the authority of the city of Weston, for the payment of a tax which the city claimed the right to levy and collect, and to enjoin the execution of a deed. The 5th section of the 1st article of the act to incorporate the city of

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Weston, approved March 3d, 1851, provides, that "the inhabitants of said city shall have power to purchase, receive and hold property, both real and personal, within said city; to purchase, receive and hold property, real and personal, beyond the city, for burial grounds, and for other public purposes." The 1st section of the 5th article conferred upon the inhabitants power "to levy and collect taxes on all property, real and personal, within the limits of the city, not to exceed one per cent. per annum upon the assessed value thereof, and may enforce the payment of the same in any manner to be provided by ordinance, not repugnant to the constitution of the United States and of this state." The 36th section of the same article conferred the power "to assess and collect a tax on all real estate outside of and adjacent to the corporation, to the distance of one-half mile; *Provided*, that no tax shall be assessed as aforesaid of more than one-half of one per cent. per annum." The 39th section authorized the city "to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in the act, so that such ordinances be not repugnant to, nor inconsistent with, the constitution of the United States." Under the 36th section of this act, the city, on the 25th of April, 1851, passed an ordinance *providing* "that a tax of one-half of one per cent. be levied upon all property, real and personal, within half a mile of the limits of the city."

On the 15th of August, 1851, an ordinance was passed authorizing the sale of land upon which the taxes should be unpaid, and providing the mode of making the sale. The 5th section authorized the execution of a deed to the purchaser, after the expiration of the time to redeem.

Under the authority conferred by the charter, and pursuant to the provisions of these ordinances, a tax of one-half of one per cent. was levied on the land of the plaintiff, lying outside of the city limits, but within half a mile therefrom; and on the 8th of October, 1852, the land was sold by the city collector for the tax, and bought by the city.

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A demurrer to the plaintiff's petition, showing all the facts, was sustained by the court below; and the plaintiff appealed. The cause was argued in this court by Messrs. *Abell*, *Stringfellow* and *Vories*, for appellant; and by Mr. *Gardenhire*, for respondent. The following is a very general and meagre statement of the points argued:

Abell, and *Stringfellow*, and *Vories*, for appellant.

I. So much of the charter as authorized the city to assess and collect a tax on land lying beyond the limits of the city is unconstitutional. 1. The constitution is not a mere limitation, but a grant of power. The government does not possess all power not prohibited, but only such as is granted. 2. There is no specific grant of the power in controversy, nor is it included in the grant of legislative power. (1 Dana, 501; 5 Dana, 30, 31; 6 Barr. 507; 4 Harrington, 479; 4 Hill, 145; 9 Gill & Johns. 365; 7 Gill & Johns. 7; 1 Bay, 98.) 3. It can not be derived from the power to organize municipal corporations, which is not a substantive, independent power, but a mere means of carrying into execution other powers, and is limited by the end to be accomplished. (Marshall, C. J. 4 Wheat.) 4. Nor can it be derived from the power to tax. (4 Hill, 82; 4 Comstock, 423, 424.) 5. The power in question is not only not granted, but is expressly prohibited by the constitution, both by the clause prohibiting the exercise of judicial power by the legislature, by the declaration, "no person shall be deprived of life, liberty or *property* except by the judgment of his peers, or by the law of the land," and by the declaration, that "no private property ought to be taken or applied to public use without just compensation." 6. The power claimed is in effect a power to take private property from one and give it to another, which is prohibited by the fundamental principles of free government, (Story, J. 2 Peters; *Scudder v. Trenton*, Dela. Falls Co. Saxton, 694,) and it violates the "inalienable right of life, liberty and the pursuit of happiness."

II. No power is given by the charter to *sell* lands outside

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of the city for taxes, and it will not be presumed. (9 Mo. Rep. 513; 4 Peters, 513; 4 Halsted, 352.)

III. The city has no capacity by her charter to *purchase* lands lying outside of the city, for the purpose of collecting her taxes. (4 Shep. 224; 2 Scamm. 87.)

Gardenhire, for respondent. The 36th section of the 5th article of the act to incorporate the city of Weston, is constitutional. 1. The power of the general assembly is unlimited, except when restrained by the constitution. (1 Tucker's Com. 4; 1 Kent, 493 to 501; 20 Wend. 381; 1 Hill, 329; 9 Mo. Rep. 507; 13 Mo. Rep. 412-13; 15 Mo. Rep. 22. 2. Such an exercise of power is not restrained by the constitution. (9 Mo. Rep. 507; 13 Mo. Rep. 412-13; 15 Mo. 1, 22, 668; 18 Mo. Rep. 210, 214, 215, 238; 19 Mo. 12, 15; 11 Mo. 102, 104, 105; 15 Pick. 60; 4 Cow. 421; 4 Peters, 516, 561, 563; 4 Wheaton, 428; 24 Wend. 68.) 3. It is not taking private property for a private purpose, or private property for a public purpose, but simply authorizing the assessment of a tax for public purposes. (4 Pick. 463; 12 Pick. 477; 23 Pick. 394-5; 2 Porter, 296, 303; 3 Paige, 73, 74; 24 Wend. 68.) 4. The city had power to sell to enforce the payment of the taxes, (Art. 5, § 1 of the charter, 9 Mo. Rep. 509; 13 Mo. Rep. 41,) and to purchase. (Art. 1, § 3 of the charter, R. C. 1845, 231; § 1, p. 236; § 23.) 5. The 19th section of the Declaration of Rights, does not require equality of taxation, but simply that all property subject to taxation shall be taxed in proportion to its value. The property subject to taxation is determinable by the general assembly. (5 Pike, 204; 5 Dana, 31; 15 Mo. Rep. 24, 25, 26.)

LEONARD, Judge, delivered the opinion of the court.

The question that has been argued before us upon this record, and the only one that we have considered, is, whether it is competent for the legislature to confer upon the city of Weston authority to tax, for local purposes, land lying beyond

the corporate limits. We have considered the matter with all the care that it is our duty to do, when we are required to decide upon the constitutional validity of a legislative act; but being clearly of opinion that this provision of the charter violates the constitutional rights of the citizen, which we are bound to protect, we are constrained to pronounce accordingly. The judgment upon the demurrer will therefore be reversed and the cause remanded.

As the very purpose of instituting government is the protection of the citizen in his person and property, power to violate these rights would seem to be quite beyond the lawful authority of any government; and certainly the legislative department of this government can not arbitrarily take the property of one citizen and give it to another, and, of course, can not authorize others to do so. This is not within the power of any properly constituted government, and our American governments are expressly prohibited from taking private property, even for public use, without compensation to the owner. To justify even such an invasion of private property, it must be shown that the use for which it is about to be taken is a public one, and that the compensation to be given has been sufficiently secured to the party; and certainly, from the very purpose of all just governments, and this express provision in our own constitution, we may safely imply a constitutional prohibition against the arbitrary taking of private property for private use without any compensation. This, however, seems to be substantially the authority here given: those who live in the town are authorized to exact annually from those who live adjacent to it, a certain portion of their property, to be applied, under their own direction, to their own local purposes. And this we think can not be done under our government, which was instituted exclusively for the protection of individual rights, and where private property is expressly protected from any appropriation of it, even to public use, without full compensation to the owner.

It is true, the legislature possess the uncontrolled power of taxation, with the single limitation that "all property sub-

ject to taxation shall be taxed in proportion to its value;" and this authority to tax, they may undoubtedly delegate to subordinate agencies, such as county tribunals and municipal corporations, to be assessed and applied locally; but here the attempt is to authorize a municipal corporation—charged with the subordinate government of persons and things within its limits, and having, as incident to this, the power to tax these persons and things for local purposes—to impose a tax upon the lands lying beyond its limits; or, in other words, arbitrarily, under the mask of a tax, to take annually from those who are without its jurisdiction a certain portion of their property lying within a half mile of the corporate limits; which we think can not be done. Although it be true, as a general proposition, that the legislature can not delegate their legislative power, but must exercise it themselves under their appropriate responsibilities; yet the practice of creating municipal corporations—with subordinate legislative power over the local affairs of the inhabitants, and, as incident to this, with authority to impose taxes upon the persons and things within the local jurisdiction in order to supply the local necessities—being firmly established, and daily practiced by our American governments when our constitution was adopted, must be considered as an ordinary legislative power, and one, of course, that our legislature may lawfully exercise. But no instance, it is believed, can be found where these corporations have been clothed with power to tax others not within their local jurisdiction for their own local purposes; and if the legislature possess the power, now claimed, over private property, they ought to exercise it themselves, and not delegate it to those whose interest it is to abuse it.

It may be often difficult to draw the line between a legitimate exercise of the taxing power and the arbitrary seizure of the property of an individual, or of a class of individuals, for local or general purposes, under the mask of this power. In *Chaony v. Hooser*, (9 Ben. Munroe, 330,) the question was as to the constitutionality of a law extending the limits of the town of Hopkinstown, for the mere purpose, as the party alleged, of bringing

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his property within the corporation as a subject of taxation; and the Judge, who delivered the opinion of the court, remarked, "this is not the case of vacant land or of a well improved farm, occupied by the owner and his family for agricultural purposes, and which, without being required for either streets or houses, or for any other purpose of the town but that of increasing its revenue, is brought within its taxing power by an act extending its limits. Such an act, though on its face simply extending the limits of a town, and presumptively a legitimate exercise of power for that purpose, would, in reality, when applied to the facts, be nothing more or less than an authority to the town to tax the land to a certain distance outside of its limits, and, in effect, to take the money of the proprietor for its own use, without compensation to him." Again, he observed, in reference to some limit in the exercise of legislative discretion in the imposition of taxes, "that limit can only consist in the discrimination to be made between what may with reasonable plausibility be called a tax, and for which it may be assumed that the objects of taxation are regarded by the legislature as forming a just compensation, and that which is palpably not a tax, but is under the form of a tax, or some other form, the taking of private property for the use of others or of the public, without compensation. The case must be one in which the operation of the power will be, at first blush, pronounced to be the taking of private property without compensation, and in which it is apparent that the burthen is imposed without any view to the interest of the individual in the objects to be accomplished by it. If it be so, no matter under what form the power is professedly exercised, whether it is in the form of laying or authorizing a tax, or in the regulation of local divisions, or boundaries, which result in a subjection to local taxes; and whether the operation be to appropriate the property of one or more individuals without their consent, to the use of the general or local public, or to the use of other private individuals, or of a single individual,—the case must be regarded as coming within the prohibition contained in this

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clause, or the constitution is impotent for the protection of individual rights of property from any aggression, however flagrant, which may be made upon them, provided it be done under color of some recognized power."

Without, however, expressing any opinion upon imaginary cases, it is sufficient for the decision of the case now before us, that the legislature can not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits; and upon this principle, the judgment of the circuit court is reversed and the cause remanded.

SLOVER, Appellant, v. MUNCY, Respondent.

1. The list of delinquents, which the road overseer is required to place in the hands of the justice, (R. C. 1845, tit. Roads and Highways, art. 1, § 45,) is for the information and government of the justice, whose duty it becomes to issue a summons against such delinquent, and is not intended as a written complaint against the party for his information. No written complaint is necessary.
2. In the circuit court on appeal, after an appearance and trial on the merits before the justice, it is no ground for dismissing a proceeding, commenced under the statute in the name of a road overseer against a delinquent hand, that the summons, which is required to issue in the name of the road overseer "to the use of the road district," simply describes the plaintiff as "road supervisor," without specifying the district, this being specified in the entry of judgment.

Appeal from Barry Circuit Court.

This was a proceeding commenced before a justice of the peace, under sections 44, 45, 46 and 47, of article 1 of the act concerning "Roads and Highways," (R. C. 1845.)

On the 26th of March, 1855, there was filed with the justice a list of names, with a figure opposite each, at the foot of which was the following memorandum: "You will please issue on the above delinquent list. Abraham Slover, supervisor." On the next day, the justice issued a summons against Muncy, the defendant, whose name was on the list, requiring him to appear

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on the 11th of April, and answer the complaint of "Abraham Slover, road supervisor." On the day appointed, the plaintiff and defendant appeared before the justice, and a judgment was rendered in favor of the plaintiff, to the use of his road district, for three dollars and costs. The justices' docket specified the district of which plaintiff was overseer. The defendant appealed to the Circuit Court, where he renewed a motion made before the justice to dismiss the cause, which was sustained. The plaintiff excepted and appealed to this court.

Gardenhire, for appellant. 1. The proceedings of road overseers against delinquent hands are special and summary, and no appeal lies from the justice in such cases. (6 Mo. 166.) 2. The Circuit Court erred in dismissing the cause, as there was a substantial compliance with the law, which is all that is required in proceedings before justices. (15 Mo. Rep. 442-3.)

F. P. Wright, for respondent. The appeal was properly dismissed. 1. The list filed with the justice did not specify whether the delinquency consisted in failing to attend, or in failing to obey orders, which are two separate offences, with different penalties. The list was too uncertain to authorize the justice to issue a summons. (R. C. 1845, p. 967, § 44, 45.) 2. The summons did not issue in the name of the overseer, *to the use of his road district*, as required by the statute. The statute is penal, and must be strictly complied with.

LEONARD, Judge, delivered the opinion of the court.

The proceedings before the justice were, we think, sufficient to retain the case in court, and therefore the Circuit Court erred in dismissing it. The cause should have been tried anew, on the merits, and of course the judgment must be reversed and the cause remanded, when the defendant will have an opportunity of insisting upon any more substantial defence he may have. The statute direction to the overseer to deliver a list of delinquent hands to some justice of the township, is for the in-

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formation and government of the justice, whose duty it then becomes to issue a summons against each delinquent, and to proceed therein as in ordinary cases. (R. C. 1845, tit. Roads and Highways, art. 1, secs. 44, 45, 46, 47.) The law does not require any thing to be put into the list except the names of the persons to be proceeded against, and of course does not intend it as a written complaint against the party for his information. These defendants have the same means of knowing what they are sued for that other defendants have in ordinary cases in justices' courts.

The suit is to be commenced in the name of the overseer to to the use of his road district; in other words, it is conducted in his official and not in his individual capacity, and the present summons, in describing the plaintiff as road overseer or supervisor, (which is the same thing,) sufficiently indicated this, although it was indefinite as to the specific district. This defect, however, was cured in the entry of the judgment which designated the particular road district of which the plaintiff was overseer, and certainly there is no principle upon which an error of this character in the process to bring a party into court, ought to have the effect, after an appearance and trial on the merits, of requiring the Circuit Court, upon an appeal, to dismiss the whole proceeding.

The alleged errors in the proceedings of the justice may all very well be considered of that class that the Circuit Court, upon an appeal, is required to disregard. (R. C. 1845, tit. Justices' Courts, art. 8, sec. 13.)

The judgment is accordingly reversed, and the cause remanded; Judge Ryland concurring.

O'DONOGHUE, Respondent, v. CORBY, Appellant.

1. A refusal to deliver up a chattel to the owner on demand, without lawful excuse, is a conversion.
2. It is no excuse for refusing to deliver up to the owner a paper evidencing a debt, that the debt is not justly owing, nor can it be imposed as a con-

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dition to the delivery that he shall refund what he has already received upon it.

3. In an action of trover, for the conversion of a paper evidencing a debt, the measure of damages is *prima facie* the amount the paper calls for, though this may be reduced by showing payment, or that the amount is not justly due, or by other evidence that the value is less than it purports to be.

Appeal from Buchanan Court of Common Pleas.

This was an action in the nature of trover, for the conversion of a paper, upon which was an account against the Hannibal and St. Joseph Railroad company.

The petition stated that the plaintiff was lawfully possessed of the account as of his own property; that it was audited and allowed, and in such a condition that, under the by-laws or rules of the company, he was entitled to demand payment of it from the defendant, who was the treasurer; that he presented it for payment to the defendant, in St. Louis, who then paid one hundred dollars upon it, and agreed to pay the balance of \$264 upon their return to St. Joseph, under which agreement the plaintiff delivered the account to him, and that the defendant refused to pay the balance on demand; whereupon the plaintiff demanded the account, which the defendant had refused to deliver up, and had converted to his own use, to the damage of the plaintiff, &c.

The defendant answered that the account contained false charges, and was allowed by the auditing committee under a mistake as to the facts, which were well known to the plaintiff, and that payment had been withheld by direction of the president of the company. He denied the conversion of the paper, and stated that he had offered to deliver it up if the plaintiff would refund the one hundred dollars received upon it, which the plaintiff had declined to do, and that he was therefore forced to retain it for his own protection, as it was his only voucher for the payment.

Upon these pleadings, the case came to trial. Neither party offered any evidence, and the court instructed the jury to find

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for plaintiff the sum of \$264. Several instructions asked by the defendant were refused, and he appealed to this court.

H. M. Vories, for appellant. 1. The facts stated in the petition show that this action, which is in the form of trover, can not be maintained; but that if plaintiff had any cause of action, it was on the defendant's promise to pay the balance of the account. (*Duncan v. Fisher*, 18 Mo. 403.) 2. A demand and refusal may or may not amount to a conversion, and this is a question of fact, which should have been left to the jury, as also the amount of damages. (2 Greenl. Ev. § 644-5; 2 Saund. 47, *e.*; 2 Mod. 144; 18 Mo. Rep. 170.) 3. To maintain this action, the plaintiff must have had a complete property in the note and a right to the immediate possession. (1 Chitty's Pl. 170, and cases cited.) In this case, the plaintiff had delivered up the account to defendant as treasurer for one hundred dollars and his *promise* to pay the balance. He could not rescind the contract and demand the account without returning the money received.

Gardenhire, for respondent. Whether this case is treated as trover for the account or *assumpsit* for the balance due, all the allegations of the petition necessary to a recovery were admitted by the answer, and nothing was proved in avoidance. If the case is treated as trover, the demand and refusal were admitted, which was *prima facie* a conversion. (1 Cow. 322; 2 Mass. 398.) And so the plaintiff's property in the account was admitted. (7 Johns. 254; 10 Johns. 172.) If the case is treated as *assumpsit*, the promise to pay the balance was admitted.

LEONARD, Judge, delivered the opinion of the court.

There are only two questions in this record — whether the conversion of the instrument sued for was admitted by the pleadings, and if so, whether the amount the paper called for was *prima facie* the proper measure of the damage. The instructions need not be considered except as they tend to raise

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these questions—both of which must be answered in the affirmative. It is true, a demand and refusal is not a conversion, but only evidence of one; and the reason is, the party may have had a lawful reason for what he did. Here, however, he states the reason, and as it is altogether insufficient, his refusal was without a lawful excuse, and therefore, without any thing more, a conversion of the property to his own use.

The defendant paid a hundred dollars to the plaintiff on the order when it was first presented, and promised to pay the balance upon the return of the parties to St. Joseph. Being subsequently advised, as he states in his answer, that there was some fraud or mistake in the settlement, so that the plaintiff was not entitled to the money, he not only declined paying the residue, but refused to restore the paper unless the plaintiff would return the hundred dollars he had already received. Clearly, the alleged fraud or mistake, if proved, would have been no ground for withholding the order, although it may have been a very good reason, if true in fact, for withholding payment; and the defendant certainly had no right to impose any condition upon the plaintiff to entitle him to the possession of his own property.

This instrument was, it seems, an account settled between the plaintiff and the Hannibal and St. Joseph Railroad company, which not only imported that the sum stated was due from the company to the plaintiff, but entitled the latter to the money upon presenting it to the company's officer for that purpose. The amount therefore that the instrument called for was, *prima facie*, the value of it; and, in the absence of any other proof, the proper measure of the plaintiff's damages. (Sedg. on Dam. 2d ed. ch. 19, p. 488, and cases there cited.) The jury have found accordingly, under the instructions of the court, and no error, in point of law, has been committed. It was competent for the defendant to have met this *prima facie* case, by showing that the instrument was of less value than it purported to be; or, indeed, that it was of no greater value than the paper upon which it was written, by showing payment, or the facts set up

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in the answer, or any facts impeaching the validity of the instrument ; but he declined going into proof upon this point, and must abide the result. (Sedg. on Dam. above referred to.) Judge Ryland concurring, the judgment will be affirmed.

HIGGINS, Defendant in Error, v. DELLINGER, Plaintiff in Error.

1. A party who is compelled to pay a note which he signed as security for another, who gave it for money borrowed by him as *agent* for a third party, may recover the amount directly from him for whom the money was borrowed ; and it makes no difference that the agent did not disclose his agency, or that the money was loaned and the note signed by the security upon his individual credit.
2. A letter written by the party sought to be charged as principal, not denying his liability, but regretting his inability to meet the demand, is evidence sufficient to sustain a finding by a jury of the fact of agency, although written in answer to a letter falsely stating that he had signed the note.

Error to Cole Circuit Court.

Action for money paid by plaintiff to the use of the defendant, Frederick Dellinger.

At the trial, it appeared in evidence that in 1848 Samuel Dellinger applied to William C. Young, stating that his brother, the defendant, who was then in Virginia, had written requesting him to send him some money, and that he had none on hand, and desired to borrow. Young consented to loan him \$300, and at his request enclosed a draft for that amount in a letter to the defendant. In the spring of 1849, Young applied to Samuel for security for the money loaned, who thereupon executed a bond for the amount, with plaintiff as security. At the foot of the bond, a blank was left opposite the first seal for the signature of the defendant, which, however, was never obtained. This bond was afterwards assigned by Young to W. P. Riggins, and was allowed as an offset in a suit brought by plaintiff against said Riggins. The present suit is brought to recover the amount thus paid by plaintiff.

Young testified that he loaned the money to Samuel Dellinger upon his individual responsibility, and did not know the defendant in the transaction. He did not know whether Samuel owed the defendant that amount, or whether he loaned it to him. He had previously heard him say that the defendant had an interest in the estate of a deceased brother, who died in Pultaski county, Missouri.

The plaintiff read in evidence two letters from defendant to him, expressing regret at his inability to relieve him from the payment of the bond given to Young and a desire that an arrangement previously made that the money should be paid out of his share in the estate of his deceased brother might be carried out.

The defendant, in rebuttal, read in evidence a letter from the plaintiff to himself, in reply to which the two letters above referred to were written, in which it was stated that the note given to Young was signed by the defendant.

The Circuit Court gave the following instructions asked by plaintiff, to which the defendant excepted :

1. If defendant procured Samuel Dellinger to get the money for him, and got Young to send it to him, and he received it, the jury must find for the plaintiff, and may allow interest ; and in such case, it can make no difference that Samuel gave his own note for the money, with plaintiff as security.

3. If the money was borrowed by Samuel Dellinger for the defendant, the fact that Young looked to Samuel and the plaintiff alone for payment can not prevent a recovery against the defendant.

The court gave the following instruction, of its own motion, to which the defendant excepted : " If the jury believe from the evidence that Samuel Dellinger borrowed the money loaned by William C. Young for himself, and not as agent of the defendant, and the said Samuel loaned it to the defendant, and that Samuel Dellinger, as principal, and the plaintiff as security, gave their bond to Young for the amount, the estate of

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Samuel Dellinger is liable to the plaintiff for the amount of said debt, and not the defendant."

There was a verdict for the plaintiff.

M. M. Parsons, for plaintiff in error.

White and Gardenhire, for defendant in error, cited *Story on Agency*, § 58, 59.

LEONARD, Judge, delivered the opinion of the court.

If Samuel Dellinger borrowed the money as the agent of his brother Frederick, and afterwards, to secure its repayment, gave his own note, with the plaintiff as his security, who subsequently paid the money, it was the duty of the defendant to refund it to the plaintiff, and the law will imply a promise between these parties to that effect; and if this were so, it is quite immaterial in this case that the agent did not divulge his agency, or the name of his principal, or that the money was loaned originally by Young, and the contract of suretiship subsequently entered into by Higgins, upon the individual credit of Samuel Dellinger. If, however, Samuel Dellinger borrowed the money for himself, either to pay a debt he owed his brother, or to make a loan to him, then Frederick was not liable to the plaintiff, but to his brother's estate. This, we think, is the law of the case, and substantially the instruction the court gave the jury, and there is no ground for disturbing the judgment.

In *Story on Agency*, § 270, it is said: "If the agent contracts in such form as to render himself personally responsible, he can not afterwards, whether his principal be or be not known at the time of the contract, relieve himself of that responsibility. But, although the agent may thus bind himself personally, yet this by no means shows that the principal may not also be bound as a party to the contract through his agent; for there is no doubt that parol evidence is admissible in behalf of one of the contracting parties to show that the other was an agent only in the sale, although contracting in his own name, so as to fix the real principal." In *Hopkins v. Lacouture*, (4

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La. An. Rep. 64,) Porter, justice, in delivering the opinion of the court, after referring to some common law authorities upon the question how far a power executed in the name of the agent bound his principal, remarks: "Be the rule, however, as it may be in that system of law under which these opinions were expressed, we apprehend it is clear in ours that a power executed by an agent in his own name, does bind the principal when he acts in the business entrusted to him, and according to the power conferred. The liability of the principal depends on the act done, and not on the form in which it is executed. The only difference is, that when the agent contracts in his own name, he adds his personal responsibility to that of the person who has empowered him." And these remarks are adopted by Story, with approbation, in the section before referred to. In *Higgins v. Senior*, (8 Mees. & Welsb. 440,) Mr. Baron Parke said, in delivering the opinion of the court, "There is no doubt, when an agreement is made, it is competent to show that one or more of the parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principal, and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal." The principle of these cases is the same as of a dormant partner, where, though the person furnishing goods to the ostensible partners intended at the time to give credit to them only, yet he may afterwards pursue his remedy against the dormant partner, when discovered.

It is said to be impossible to reconcile the American cases upon the question of the liability of the principal, when the obligation is executed in the name of the agent only; and if the instrument here given, to secure the repayment of the money,

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were, as it appears on its face to have been, a bond, it, of course, was not obligatory as such on the defendant. We think, however, that this is not at all material in the present case, and that, looking to the substance of the transaction, we may disregard the form in which it was clothed, and hold that, if the money were borrowed through his agent, upon an obligation that could have been enforced against the agent only, that as he would have been bound in that case to have indemnified his agent, he was equally bound to indemnify the agent's security; and that the request of the agent to the plaintiff, to enter into this contract of suretiship, may very well be considered as the request of his principal, from which to imply a promise on his part to indemnify the security.

It is insisted, however, that there was no evidence of agency to warrant the instructions the court gave, or to justify the finding of the jury; but we think otherwise. The money was forwarded to the defendant as soon as it was borrowed: he received it, and used it; and when afterwards informed that his name was on the note for its repayment, and he was called upon as the real debtor to pay, so far from denying his liability, he expressed his regret at his inability to meet it. These letters, however, it seems, were in answer to one in which it was falsely suggested that *he had signed the note*; but certainly this does not diminish the force of the implied admission, so clearly made in them, that the money was borrowed for his use, and that he was the party who ought to repay it. He might forget whether he had signed the note given for money his brother had borrowed for him; but we can hardly suppose that, upon the false suggestion of this letter, he could be led into the belief that the money for which the note was given was borrowed for him, and ought to be repaid by him, if the fact were altogether otherwise. Indeed, these letters show, we think, quite satisfactorily, that Samuel Dellinger borrowed the money, not to pay any debt due from him to his brother, but as his brother's agent, in anticipation however, and under the expectation entertained by both, that it would be refunded out of

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Frederick Dellinger's share in his deceased brother's estate. We are satisfied that justice has been administered between these parties according to law. Judge Ryland concurring, the judgment is affirmed.

BACHELOR, Respondent, v. BESS, Appellant.

1. Where the amount of damages claimed by the plaintiff in a suit before a justice is not expressly shown, the amount for which he accepts a judgment will be taken as the amount claimed; and although the plaintiff may in the justice's court enter a *remittitur* for the excess recovered beyond the justice's jurisdiction, he can not be permitted to do this in the circuit court on appeal, so as to give jurisdiction.
2. If, in order to authorize the supreme court to reverse a judgment, in a case commenced before a justice, for want of jurisdiction, it must appear that the question of jurisdiction was raised and passed upon in the circuit court; this is sufficiently shown by a motion for a review in which the objection is made, although a motion for a review is not applicable in such a case.

Appeal from Stoddard Circuit Court.

This was an action commenced before a justice of the peace on the following instrument of writing :

" On or before the 20th day of November, 1854, I promise to pay John Batchelor or order, two hundred and twenty-five bushels of *merchandise*, corn, to be delivered on the farm I have bo't of him; value rec'd, this the 19th day of January, 1853.

WM. H. BESS."

At the trial, the defendant moved to dismiss the suit for want of jurisdiction. The justice overruled the motion, and gave judgment for the plaintiff for \$112 50. The defendant appealed to the Circuit Court, where a trial by the court, without a jury, resulted in a judgment for the plaintiff for ninety dollars. The court filed a written decision, or finding of facts, which stated that the value of the corn, when it became due, was one hundred and twenty-three dollars and seventy-five cents, and that the plaintiff remitted \$33 75.

The defendant filed a motion for a review, with reasons, one

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of which was, that the value of the corn sued for exceeded the justice's jurisdiction. The motion was overruled, and the defendant brought the case by appeal to this court.

J. W. Morrow, for appellant. 1. The remittitur in the Circuit Court could not aid the plaintiff. The justice had no jurisdiction, and consequently the Circuit Court could not have any. (R. C. 1845, p. 634-5.) 2. Justices of the peace have no jurisdiction in actions on notes exceeding ninety dollars, to be paid in property. (*Martin v. Chauvin*, 7 Mo. 277.)

Hardin, for respondent. 1. All errors of the justice were corrected by the judgment of the Circuit Court. (R. C. 1845, p. 670.) If the Circuit Court committed error, the case has not been saved properly. No instructions were asked, no evidence preserved, no exceptions saved; no motion for a new trial, nor any motion in arrest of judgment, &c. The record shows that there was a finding of the facts by the court, and a motion for a review of the judgment; but these were not necessary. (20 Mo. 453.) This finding was not authorized by law, and therefore no part of the record, and can not be used to show error in the judgment. (See the case of *Harrison v. State*, 10 Mo. 688.)

LEONARD, Judge, delivered the opinion of the court.

The claim of the plaintiff and the amount adjudged both exceeded a justice's jurisdiction; for, although the amount of damages claimed by the plaintiff is nowhere expressly shown, the amount for which he accepted a judgment must be here imputed to him as the amount he claimed. If he had remitted in the justice's court the excess of damage there found, that would have been sufficient; and such, it is believed, has been the opinion and practice upon this subject. But such a remittitur in the Circuit Court, after the cause has been transferred there, by appeal, can not have the same effect. When the Circuit Court becomes possessed of a cause in this manner, the lawful jurisdiction depends upon the jurisdiction of the first

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court. If that tribunal had no lawful authority over the case, the Circuit Court can not acquire any by the appeal. This must be so on principle, and if we were to adjudge otherwise, the practical effect would be that, upon an appeal, on account of the defect of jurisdiction, the costs would be thrown upon the appealing party, by the mere act of the adverse party, upon his doing that in the Circuit Court that he might have done in the justice's court, and which, if done there, would have superseded the necessity of appealing. This defect of jurisdiction is not one of those imperfections in the proceedings of a justice required to be disregarded by the Circuit Court upon an appeal, (R. C. 1845, tit. "Justices' Courts," art. 8, sec. 13); and, although the remittitur in the Circuit Court, and the judgment there, for the reduced amount, may, in fact, be for the benefit instead of the injury of the party, he has yet a right to insist upon the exercise of the jurisdiction over him, where none exists, as an error to his prejudice, which this court can not disregard.

As to the point that the objection is not properly saved, we remark that the amount of the recovery in the justice's court appears, of course, upon the record, without any bill of exceptions; and if, in order to authorize us to correct an error of this character—the exercise of jurisdiction where none exists—it must appear that the attention of the court was expressly called to it, and the matter passed upon, that is sufficiently done here by the motion and reasons for a review preserved in the bill of exceptions, which, although not applicable to a proceeding of this character, is sufficient for the purpose here indicated. The result is, the judgment of the Circuit Court must be reversed, and the suit dismissed, leaving the plaintiff at liberty to bring a fresh suit in either jurisdiction, according to the amount he may seek to recover; and, Judge Ryland concurring, it is ordered accordingly.

ROLLINS, Respondent, v. CLAYBROOK, Appellant.

1. Where a written memorandum of a contract of sale does not purport to be a complete expression of the entire contract, and is uncertain as to the property sold, this may be designated by parol evidence.
2. Money paid upon a contract which the other party fails to perform, may be recovered back as a part of the damages for the non-performance, without a demand.

Appeal from Moniteau Circuit Court.

Action brought by Rollins against Claybrook, for the breach of a contract stated in the petition to be for the sale of "a certain lot of pork hogs, which the defendant then had up fattening, which were to weigh in the whole not less than four thousand pounds."

The purport of the petition and answer, and of the evidence offered at the trial, is sufficiently stated in the opinion of the court, and it is only necessary to add the written memorandum of the contract, which was as follows :

"Hogs bought of G. Claybrook Nov. 12, 1852.

"To weigh 200 lbs., \$3 85 per 100 lbs.; over 175 lbs., \$3 60 per 100 lbs.; under 175 lbs., \$3 50 per 100 lbs., with privilege of delivering from 4 to 10,000 lbs.; and also privilege of delivering at Sandy Hook, at \$3 50, \$3 75 and \$4 per 100 lbs.; and I have also paid said Claybrook \$20 to bind said contract, &c.—to be delivered within 1st of November, 1852, and 1st of February, 1853.

"DAVID E. G. ROLLINS."

The defendant, after verdict and judgment against him, appealed to this court.

Gardenhire, for appellant. 1. The written contract was for "from four to ten thousand pounds," saying nothing at all about hogs fattened by defendant or their minimum value, and of course not binding defendant to deliver any particular lot of hogs. To allow these things to be added by parol was manifest error. (8 Mo. 391.) 2. The money paid could not be

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recovered back without a previous demand. (16 Mo. 528; 18 Mo. 154; ib. 375; 19 Mo. 467.)

E. L. Edwards, for respondent. The evidence was properly admitted, as it was not offered to alter, or in any manner change the contract, but to show what particular hogs were bought. (Smith on Con., marginal p. 29, 30, top p. 94.)

LEONARD, Judge, delivered the opinion of the court.

The plaintiff seeks to recover damages for the non-delivery of a specific lot of hogs, bought of the defendant, and which the latter engaged would weigh four thousand pounds; and states that he paid the defendant twenty dollars, and made and signed a memorandum of the contract, which he delivered to the defendant. The latter admits in his answer the making of a contract as specified on the written memorandum; but insists that it was a contract for the sale of pork by the quantity and not of a specific lot, and that within the time allowed for that purpose he tendered part of the quantity, and would have paid the whole, but the plaintiff refused to receive it. Upon the trial, the written memorandum was read in evidence, and the plaintiff was allowed to prove, by parol, that "the defendant sold a specific lot of hogs, in his pen, fattened by himself, and that the plaintiff was to receive no hog weighing less than one hundred and fifty pounds," and then gave evidence that the defendant had disposed of this lot elsewhere. No evidence of the demand of the twenty dollars was given, and the plaintiff, under instructions from the court, had a verdict for thirty dollars.

The only matters now material to the defendant are, the admission of the parol evidence, as to the contract, and the instruction allowing the plaintiff to recover the twenty dollars without a previous demand. Written instruments, executed by the parties themselves, are, in their very nature, most trustworthy evidence of what the parties have transacted. It is their own testimony, that they have furnished against themselves, and, of course, it can not be said of it, as of a witness, that it

misrepresents either through ignorance, negligence or design ; and being permanent and not subject to decay, like the memory of a living witness, it continues to be a faithful memorial of the transaction, no matter what length of time may have since intervened. This superiority of written over oral evidence has induced the legislature to require certain contracts—some on account of the value involved, and others on account of their peculiar nature—to be authenticated by a written instrument ; but whether a writing be adopted as the repository of the contract, either by command of the law or by the agreement of the parties, the same rule prevails as to the exclusion of parol evidence. If the instrument import a legal obligation, without uncertainty as to the object and extent of the engagement, it is conclusively presumed that the whole engagement of the parties was reduced to writing, and no cotemporaneous parol evidence is admissible to change the contract, by altering or expunging any of its provisions, or by adding new ones to it. When the written agreement is required by law, this rule is necessary to make the statute effectual ; and when the parties themselves have adopted one to express their contract, because they are unwilling to trust to the memory of witnesses, the same rule is necessary to carry out their intention. (Rutland's case, 5 Co. Rep. 26 ; Stackpole v. Arnold, 11 Mass. 29-30 ; Smith v. Williams, 1 Murphy (N. C.) Rep. 430.) But this does not apply where the writing is imperfect, and does not import a complete expression of the entire contract. (2 Phil. Ev. 772, 8th Lond. ed. ; 1 Greenl. Ev. § 284, *a.* ; 3 Cow. & Hill's notes to Phil's Ev. 1471-72, and cases there cited ; Jeffry v. Walton, 1 Stark. R. 113.) The last case was an action for an injury to a horse hired by the defendant. At the time of hiring, a written memorandum was made to this effect : " Six weeks, at two guineas. W. Walton." And it was verbally agreed that the defendant should be liable for all accidents. This evidence was objected to, but received by Lord Ellenborough, who said, " The written agreement merely regulates the time of hiring and rate of payment, and I shall not allow any

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evidence to be given by the plaintiff in contradiction of these terms ; but I am of opinion it is competent for the plaintiff to give in evidence suppletory matter as part of the agreement." The present case is, we think, of the same character. We pass by the fact that the writing was not in any way authenticated by the defendant, so as to make it a written contract on his part, excluding parol evidence, (*Tesdale v. Harris*, 20 Pick. 12), and was only evidence against him on account of his reference to it in his answer as containing the terms of the agreement, and will consider the matter as if the writing had been signed by him. If we read it without the clause, "with the privilege of delivering four to 10,000 pounds," there is no undertaking by the defendant to deliver any specific lot of hogs, or any definite quantity of pork, and the paper, in that shape, is only a memorandum of the price and the time of delivery ; and we do not think the introduction of this clause had any effect, other than that for which it was introduced, to secure to the seller the privilege of delivering, at the same price and time, any quantity of pork not exceeding six thousand pounds over and above the hogs he had sold to the plaintiff, and was, of course, bound to deliver. The instrument, when read as it stands, does not import in itself a legal obligation on the defendant to deliver four thousand pounds of pork to the plaintiff, although it is to be inferred, from reading it, that there was some engagement between the parties not merged in the writing, from the delivery by the defendant of a specific lot of hogs that it was thought would come up to that quantity, or to deliver that quantity by weight. The writing, at the utmost, was only an imperfect instrument of contract on the part of the defendant, and certainly does not import an obligation on his part, as to the property to be delivered, with that degree of certainty that is necessary in order to exclude parol evidence in relation to it.

As to the demand of the twenty dollars, we need only remark that this suit was for the breach of an existing contract, in the part performance of which the plaintiff had paid the money, and which, upon a breach of it, he would be entitled to

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recover back, in the shape of damages, for the non-delivery of the pork, and we must suppose that it was so allowed here by the jury, and, of course, no error has been committed in this matter to the prejudice of the defendant.

Judge Ryland concurring, the judgment is affirmed.

PASLEY, Respondent, v. KEMP, Appellant.

1. The supreme court will not reverse a judgment for the giving of an instruction which could not have prejudiced the appellant, nor for the refusal of instructions not warranted by the evidence.

Appeal from Callaway Circuit Court.

The case is stated in the opinion of the court.

Gardenhire and *H. C. Hayden*, for appellant.

J. F. Jones, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This is an action of slander, for words charged to have been spoken by the defendant of the plaintiff. The words charged in the first count are as follows: "You (meaning plaintiff) were a damned rogue in Virginia, and have followed stealing since you (meaning plaintiff) have been here, (meaning in Callaway county, Missouri); you (meaning plaintiff) stole my (meaning defendant's) staves and nails." In the second count the words are thus charged: "I (meaning defendant) gave Samuel Pasley (meaning plaintiff) a damned good cursing yesterday: he (meaning plaintiff) was a damned rogue in Virginia, and has followed stealing since he has been here, (meaning Callaway county, Missouri): he (meaning plaintiff) stole my (meaning defendant's) staves and nails, and I (meaning defendant) can prove it—God damn him."

The defendant denied the speaking of the words in his answer; denied all the material allegations in the plaintiff's peti-

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tion. The cause was tried and the jury returned their verdict for the plaintiff, and assessed his damages at \$750. The plaintiff remitted the sum of \$250, and judgment was rendered in his favor for the balance. The defendant moved for a new trial, also in arrest of judgment, which being overruled, he accepted, and brings the case here by appeal.

In this court, the defendant (that is the appellant) objects to the judgment of the Circuit Court, and insists that it ought to be reversed, because the testimony did not prove the words as laid down; that, whether the words were proved or not was a question for the court, and if not proved, the plaintiff ought to have been nonsuited; that the 2d and 3d instructions for the defendant ought to have been given to the jury; and that the judgment ought to have been arrested, because the petition of the plaintiff is insufficient. Now as respects the proof of the speaking of the words, we think that it was sufficient to carry the case to the jury. The testimony, as set forth in the bill of exceptions, substantially proved some of the charges in the words, as laid in the petition. It was proved that defendant said, "Samuel Pasley (meaning the plaintiff) was a damned rogue, for he stole his (defendant's) staves and nails, and that he could prove it—God damn him."

There was much proof about the charge of being a "rogue in Virginia, and keeping up stealing out here." Indeed, the proof manifestly shows the conduct of a man of violent passions and regardless of his words, and the only excuse for his conduct, the habit of drinking spirituous liquors to excess—a most reprehensible habit, and rather an aggravation than excuse for an evil tongue. The words proved are almost identical with the words imputing one of the charges—"he stole my staves and nails."

We think the words, as laid, were sufficiently proved, at least to carry the case before the jury, and we have no doubt the defendant's counsel, at the trial, thought so likewise, otherwise he never would have omitted the proper time to make his objection for defect in proof. He would have made it before

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the Circuit Court, and not waited until after verdict, and then, for the first time, make it in this court ; but we have given him the full benefit of his objection by considering it here, and we must say that the evidence sufficiently supports the charge. There is nothing, then, in the first objection taken by appellant's counsel.

As to the instructions. The first instruction given for plaintiff must have some words left out or misplaced. It has no meaning as it now stands ; that appellant's counsel says it is nonsensical ; be this as it may, it could have done the plaintiff no good, nor the defendant any harm. It has nothing of point or pith in it ; and, I have no doubt, it was a clerical mistake or blunder. It can do no harm. We will not send the case back for such an instruction. I have not thought it necessary to copy the instructions for the plaintiff, as the first is the only one complained of. The appellant asked nine instructions, and the court gave all but the second and third, and the refusal to give these is the principal ground of error complained of in this court. In the opinion of this court, the Circuit Court very properly refused to give the two instructions, neither one of which was warranted by the evidence in the case.

The second instruction is as follows : " 2d. When the slanderous words used impute the act to have been done in another state, it devolves upon the plaintiff, before he can recover, to prove either that he has sustained a special damage thereby, or, according to the laws of that state, the act charged would, if true, subject the plaintiff to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, if such words, as used, would not import a crime indictable at common law." There is nothing in the evidence warranting this instruction. The crime charged is stealing staves and nails—not in Virginia, but in Callaway county, Missouri. This, then, was a sufficient reason for refusing this instruction, if it were otherwise free from objection, which we, by no means, admit. (3 Murph., N. C., 463 ; 14 Johns. 234.)

The third instruction : " If one be charged with stealing under

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such circumstances as show that no felony was capable of being committed, or at least was not committed, but that the act was a simple breach of trust, or a mere trespass, an action of slander can not be sustained therefor, and the jury must find for defendant." This instruction was also without any foundation. There was nothing in the case to authorize the court to give it. It was, therefore, properly refused.

In looking over the whole record, we are satisfied the case was properly and fairly submitted to the jury. The court instructed the jury on the prayer of the defendant, "that, before the jury can find for the plaintiff, they must be satisfied from the evidence that the words proved are substantially the same words as those charged in plaintiff's petition, and it is not sufficient that they contain substantially the same charge in different phraseology; for equivalent words of slander will not do, and that they must be satisfied that as many of the identical words as essentially constitute the slander have been proved precisely as laid, and must be proved in form as laid; that malice is essential to slander, and it must be shown by the plaintiff before he can recover. If defendant uttered enough of the identical words charged in plaintiff's petition to carry with them the slanderous imputation alleged, the law presumes he did it with malice; but he may rebut this presumption: and if the jury believe from the evidence that the defendant uttered the words without malice, and to those only who knew as much about the matter as he did, and were understood by all of them as referring to the acts of the plaintiff, not amounting to larceny, then the words were not slanderous, and the jury will find for the defendant."

From the facts in proof on this record, surely the defendant has no right to complain of the instructions. Under our statute of 1847, the petition is sufficient, and the court did right in overruling the motion in arrest. Upon the whole case, there appears no error calling for the correcting power of this court.

Judge Leonard concurring, the judgment below is affirmed.

McADAMS, Defendant in Error, v. McHENRY, Plaintiff in Error.

1. Judgment reversed because it appeared from the record that, after a judgment for costs was rendered against the plaintiff, a final judgment by default was rendered against the defendant without his appearance and without setting aside the former judgment.

Error to Greene Circuit Court.

The case is stated in the opinion of the court.

Hendricks, for plaintiff in error.

Wright and *Edwards*, for defendant in error, cited 10 Mo. 259; *Evans v. King*, 7 Mo. 411; *Whitney v. Budd*, 5 Mo. 443; 10 Mo. 459.

RYLAND, Judge, delivered the opinion of the court.

This was a suit by attachment, commenced in the Greene Circuit Court. The writ was made returnable to the July term, 1855. The record shows that, at the September term, 1855, on the 8th day of the term, it being the 18th day of the month, the plaintiff obtained leave for the sheriff to amend his return, and on the same day the court rendered judgment by default against the defendant for the sum of \$252 60 debt, and \$8 73 damages for the detention thereof.

Afterwards, on the 20th day of September, the plaintiff filed his interrogatories against the persons summoned as garnishees, and obtained an order on the sheriff to pay over money collected by him by sale of the attached property.

Afterwards, on 21st day of September, the defendant appeared by his attorney, and by leave of the court filed his motion to quash, set aside and vacate the judgment and proceedings in this cause, assigning as reasons therefor: 1st. The whole proceedings are irregular; 2d. The requisites of the law have not been complied with; 3d. Because the attachment was issued without a bond and endorsement of the approval thereof,

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as required by law ; 4th. Because the attachment was issued irregularly ; 5th. Because the judgment is irregular and void.

On the next day, this motion to vacate, set aside and quash the judgment and proceedings, was sustained. The entry is as follows, in part : " And upon inspection of the proceedings in this cause, it is considered by the court that the said motion be sustained and defendant go hence without day, and recover costs, for which execution may issue."

Afterwards, on the same day, the plaintiff files his bond, which was approved by the court. After this bond is filed, the court proceeds to render judgment again by default against the defendant. This is entered on the same day of the filing of the bond, and of the entry vacating the judgment and quashing the proceedings, and giving judgment against the plaintiff for costs. After the rendition of the second judgment by default against defendant, the plaintiff filed his motion to set aside the order of the court vacating, setting aside and quashing the judgment and proceedings in this cause, which the court overruled. The plaintiff excepted to this action of the court, and filed his bill of exceptions.

And on the same day, the defendant, by his attorney, moved the court to set aside and vacate this judgment last rendered against him by default, because the judgment and proceedings are irregular, and because he had no notice of the proceedings, &c. The court overruled this last motion, and the defendant excepted, and brings the case here by writ of error.

I have seldom been called to the task of deciphering and examining such a record ; its illegibility and jumble of motions demand the reproof of this court. Let the clerk below see to this business in future.

From the record, it would seem that the cause was finally disposed of by a judgment in favor of the defendant for costs. If this be so, the subsequent judgment in favor of the plaintiff was erroneous. The Circuit Court probably intended to cancel only the first judgment against the defendant, leaving the suit standing, to be further proceeded in ; if this could be made to

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appear as the true construction of the record, there would then be no error. But we must be governed by the record as it stands before us ; and here is a final judgment for costs against the plaintiff, on a motion made by defendant to quash, set aside and vacate judgment and proceedings.

We will send the case back for further action in the Circuit Court. Where a final judgment has been rendered against a party for costs, it would be irregular, without notice or appearance of the adverse party, to set aside such a judgment, and then render a judgment for the opposite party. But here, without even setting aside this judgment for costs, the court renders judgment for plaintiff, with a final judgment previously standing on record in the same cause for defendant. This may be the blunder of the clerk, or it may arise from inattention in making proper entries of the action and rulings of the court. However, to whatever cause attributable, the judgment, in this case, is erroneous, and must be reversed, and cause remanded ; Judge Leonard concurring.

VAUGHN, Defendant in Error, v. TRACY, Plaintiff in Error.

1. Possession of real property under an unrecorded deed is not, as a matter of law, *actual notice* to a subsequent purchaser, within the meaning of our registry act.
2. But a majority of the court are of opinion that it is *evidence* of notice, to be submitted to a jury.
3. The *actual notice* required by the registry act is not *certain knowledge*, but such information as men generally act upon in the transactions of life.

Error to Osage Circuit Court.

This was an action to recover the possession and obtain the legal title to one acre of ground upon which was a horse grist-mill.

At the trial before the court, without a jury, the plaintiff, Vaughn, read in evidence articles of agreement, under seal,

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between himself and William R. Huckstep, dated March 3, 1845, by which the latter obligated himself, upon the payment of a certain sum, to convey to the former eighty acres of land. This agreement was not acknowledged, but was recorded on the 18th of September, 1846. It recited that one acre of the tract, "whereon the mill now stands," had been previously sold by Huckstep to Vaughn for the sum of sixty dollars.

The defendant, Tracy, claimed title under a deed from Huckstep dated February 13, 1852, conveying eighty acres, including the acre in controversy, duly acknowledged and recorded.

At the trial, it appeared that plaintiff was in possession of the mill at the date of the deed to the defendant, and had been for some six or seven years previous, but was afterwards ousted by the defendant.

The court below gave the following declarations on motion of the defendant :

1. If the defendant, without notice of any adverse title or possession of the land in controversy, purchased the same *bona fide* and for a valuable consideration from Huckstep, and Huckstep executed and acknowledged a deed therefor to defendant, and the same has been recorded in the recorder's office of Osage county, the verdict ought to be for the defendant.

2. Although plaintiff may have been in possession of the land in controversy, and may have had a title bond or instrument in writing under seal, acknowledging the payment for said land from Huckstep, yet the plaintiff could not recover in this action, unless it appears that the instrument of writing read in evidence was duly acknowledged and recorded prior to the record of the defendant's deed, unless it appears from the evidence that defendant had actual notice of the plaintiff's title at the time of the defendant's purchase and payment for said land.

The following declaration asked by the defendant was refused :

3. The possession of the plaintiff can not affect the defendant's title unless the defendant had actual knowledge of such

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possession at the time of the execution of his deed or the payment of the purchase money.

The court found a verdict for the plaintiff, and gave a judgment for the possession and vesting in him the legal title.

No finding of facts appears in the record.

Parsons, for plaintiff in error. 1. The instrument of writing between Huckstep and Vaughn was inadmissible. It was not acknowledged, and consequently could not legally be admitted to record, so as to give constructive notice of title. Nor was it shown that Tracy, prior to his purchase and reception of the deed from Huckstep, had any knowledge of the existence of such an instrument. (R. C. 1845, tit. Conveyances, § 42, p. 226; *Popham v. Baldwin*, 2 Jones, Exch. 320.) 2. The third instruction of defendant should have been given. Bare possession, without any other evidence, direct or circumstantial, is not notice of title. (8 Mo. 19, 149; *ib.* 303; 14 Serg. & Raw. 333; 1 Hare, 52; 3 Paine, 421, and authorities there cited.)

J. W. Morrow, for defendant in error, that actual possession was notice to all the world of title, cited 4 Mo. 62; 4 N. Hamp. 404; 2 Verm. 544; 1 Littell, 350; 4 Dana, 264; 4 B. Monroe, 466; *Landes v. Brant*, 10 How. U. S. R. 348; 7 Watts, 384; 16 Ves. 249.

LEONARD, Judge, delivered the opinion of the court.

The question made by this case is, whether possession of real property under an unregistered deed, is actual notice to a subsequent purchaser, within the meaning of our registry acts.

In order that we may put a correct interpretation upon these words, it may not be improper to refer to the state of the law upon this subject when the act was passed. The words of the lawgiver tacitly refer to the circumstances by which he is surrounded, and we must read them in connection with those circumstances, in order to put a sensible construction upon them. After courts of equity had established their jurisdiction in enforcing the specific performance of contracts for the purchase

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of real property, they did not content themselves with administering a mere personal equity against the seller, but went yet further, and recognized not only the personal obligation on the part of the seller to transfer the legal title, but an interest in the buyer in the land sold, constituting an equitable ownership on his part, as contradistinguished from the legal ownership which remained in the seller. When, therefore, a contest arose between these two species of ownership for superiority, the courts laid down the principle that the latter should give way to the former, except in the hands of a purchaser for value without notice. The effect of this was, that a valid contract of purchase bound not only the seller, but also the land—not only in the hands of himself and of his heirs, and voluntary grantees, but also in the hands of a purchaser for value, whose conscience was affected by notice of the existing equitable right of the first purchaser. Now as it is a rule not only of morals, but also of public policy, that every one should use his own property, and conduct his own affairs, with proper prudence, so as not to hurt his neighbor, and that those who should fail to do so ought to answer for any damage they might occasion, the courts held that the equitable ownership should prevail, not only against a purchaser with *actual notice*, but also against one who bought under such circumstances *as would have afforded him notice had he used proper care in making the purchase*, and the distinction was thus made in English equity between *actual* and *implied notice*. The former was actual knowledge or information; and the latter, facts and circumstances, not amounting to knowledge or information, from which the law *conclusively presumed notice*, and which it would not allow to be contradicted by contrary evidence. Actual notice, like any other fact, might be proved by direct evidence, or inferred from the facts and circumstances of the transaction; but however proved, whether by direct evidence, or inferred from other facts, it was *actual notice*, and clearly distinguishable from *implied notice*, which was the notice the law imputed to a party under certain circumstances, and which it would not

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allow to be contradicted, no matter how the fact might be; in other words, implied notice seems to be a "*presumptio juris et jure*," grounded upon the facts and circumstances relied upon for that purpose. (2 Sug. on Vendors, 278; Plumbe v. Flintt, 2 Anst. 438; Kennedy v. Green, 3 My. & K. and 2 Lead. cases in Eq. 99.) We remark here, that in England it was always held to be a want of proper care to buy from one out of possession, without inquiring into the cause of it, and an averment that the seller was in possession was essential in a plea of a purchase for a valuable consideration without notice. (Jackson v. Rowe, 4 Russ. 514, and cases there referred to.) And, therefore, if the land sold were in the occupation of another, and the buyer neglected to inquire into the title of the possessor, the law, from this circumstance, conclusively imputed to him notice of whatever title the party in possession had, because, if he had inquired, as it was considered his duty to have done, he would have obtained this information, and all injury to the party would have been avoided. When the registry acts first came under the consideration of the English court of equity, they applied their own principles to them; and while they admitted that the legal title was bound by the words of the statute, and that the unregistered deed was therefore void at law as against the subsequent registered deed, they held that, if the second purchaser bought with notice of the prior sale, so that his conscience was affected, the land, the sale of which was sufficiently shown by the unregistered deed, became bound in equity in his hands, and thus the unregistered deed finally prevailed over the subsequent registered deed with notice, by the aid of the court of chancery; and the court, at the same time, applied to the case their own doctrine of *implied notice*, at least whenever the facts and circumstances were so gross as to affect the purchaser with fraud, and a purchase from one of land in the possession of another was always considered of that character. (Le Neve v. Le Neve, 3 Atk. 646.)

The first registry acts in America merely declared the unregistered deed void; in the New England states, generally,

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without specifying the persons in whose favor they were to be void; but in New York, against subsequent *bona fide* purchasers only. In New England, where there was no distinct system of equity, the law courts, by an equitable construction of the statute, declared an unregistered deed to be void *only against* persons subsequently taking a specific interest in the land for value, *without notice*, and, in this manner, furnished relief to a party holding under an unregistered deed, similar to the relief given by English equity.

In New York, under their statute, the question, who are *bona fide* purchasers? became a question of law, and the rules of English equity in reference to *actual and implied notice*, became rules of law, and were administered in the law courts. (Tuttle v. Jackson, 6 Wend. 213.) In recent revisions of their statute law, several of the states have incorporated this principle of equity into their registry laws, by declaring "that any unregistered deed shall not be valid, except against a party with notice;" and in the Massachusetts and Maine revised statutes, the expression is "actual notice."

Our original act, passed in October, 1804, (1 Terr. Laws, 46,) declared, "that the unrecorded deed should be void against a subsequent purchaser for a valuable consideration;" but in the revision, in 1825, the provision was, that it should not be binding "except between the parties and such as have *actual notice*," and it has so continued ever since; and now the question is, as already stated, whether possession is actual notice within the meaning of the act? We think the legislature here referred to *actual notice*, as contradistinguished from *implied notice*, both of which were well known terms in our law when the act was passed; and we all concur in reversing the present judgment upon the ground that possession is not, as the Circuit Court seemed to suppose, as a mere matter of law, *actual notice* within the meaning of our recording acts. The case must, therefore, be remanded to be retried, and we defer, until all the circumstances of the transaction shall be developed upon this new trial, our opinion upon the question how far

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and under what circumstances the fact of the open and notorious possession and apparent ownership of real property is to be considered evidence of *actual notice*, so as to bring a second purchaser within the provision of the statute, and to avoid his deed as far as it may conflict with the prior unrecorded deed under which this possession is held.

Speaking alone for myself, I may be allowed to state my present views of the subject, without, however, committing myself to any settled opinion. In all the states, under the recording acts, as they were originally expressed, possession was always considered either as implied notice of the unregistered deed, not to be contradicted, or as evidence of the fact of notice, to be submitted to the triers of the fact, and which might therefore be met and repelled by contrary evidence. It has, however, been recently held in Massachusetts, (*Pomeroy v. Stevens*, 11 Mass. 244,) that possession is not evidence of notice to be submitted to the jury, without other evidence showing that the party against whom it is offered knew or imputed such possession to a title in fee, or some higher right than that of mere occupancy, although the previous decisions, both in Massachusetts and Maine, seemed to be that the statute had not changed the existing law, but only incorporated in it the principle previously acted upon (*Curtis v. Mundy*, 3 Mass. 405); and there can be no doubt but that, previously, possession in both these states had always been considered at least competent evidence to go to a jury upon the question whether the party had notice of a prior deed. (Per Wilde, justice, in *McMehan v. Griffing*, 3 Pick. 155; *Matthews v. Demerit*, 22 Maine, 312.) Actual notice, under the statute, is a fact, and of course may be proved as any fact; and as men rarely purchase houses to live in, or improved farms to reside upon, without a personal examination, when it is within their power, it seems to me that the fact of possession may, under ordinary circumstances, be fairly presumed to have been within the purchaser's knowledge at the time he bought. The notice required by the statute is not certain knowledge, but such information as

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men generally act upon in the transactions of life. (Curtis v. Mundy, 3 Met. 405.) And, in our state, where the land is generally in the occupation of the owners in fee, it would seem that, if knowledge is brought home to the purchaser that a third person is in the possession and apparent ownership of the land, it ought, under ordinary circumstances, to be deemed sufficient information to the second purchaser that the possessor is the owner in fee, under a title derived from the former owner. It is true, the circumstances may be such as to show conclusively that the purchaser did not, in fact, know that any one was in possession, or if he did know it, the possessor may have disclaimed the ownership; and, in such cases, the jury, of course, could not find the fact of actual notice. It is quite a mistake to suppose, because the statute requires actual notice, that therefore it can only be proved by direct evidence. The *actual notice*, the fact to be proved, is the matter prescribed by the statute; the competency of the evidence is another thing to be settled by the courts, according to the ordinary rules of evidence; and the sufficiency of the evidence to establish the fact, is yet another question, which is submitted to the jury and must be passed upon by them.

The judgment is reversed, and the cause remanded.

RYLAND, Judge. I concur in the views of Judge Leonard, set forth in the above opinion; as well in reversing the judgment as in his individual views.

SCOTT, Judge. For my views on this question, I refer to the case of Beattie v. Butler, (21 Mo. 313.)

HUDSON, Defendant in Error, v. GARNER AND WIFE, Plaintiffs
in Error.

1. Words charging a woman with being a "whore" are actionable *per se*.
2. An inuendo in the petition, that the defendant intended by such words to charge the plaintiff with adultery, being unnecessary, may be rejected.
3. Where slanderous words are spoken falsely of another, it is unnecessary to aver or prove express malice.

Error to Benton Circuit Court.

The facts sufficiently appear in the opinion.

F. P. Wright, for plaintiff in error, among other points, made the following: 1. The petition does not state facts sufficient to constitute a cause of action. The complaint is that Mrs. Garner used words by which she meant that plaintiff had been guilty of adultery, and it does not appear that the plaintiff is or ever was a married woman. (3 Mo. 160.) 2. Admitting that the words are actionable in themselves, if spoken *falsely* and *maliciously*, whether they were intended to impute either adultery or fornication, yet as plaintiff, by inuendo, has declared that they were intended to impute adultery, she was bound to prove that they were uttered in the sense thus ascribed to them. (Smith v. Cary, 3 Camp. 460; 1 Chitty's Plead. 437; Mix v. Woodward, 12 Conn. 262; Williams v. Scott, 1 Crompt. & Mees. 657; 20 Mo. 542.) 3. The petition is also bad in failing to aver that the words were spoken and published falsely and *maliciously*. (1 Chitt's Pl. 436; R. C. 1845, p. 1011.)

Gardenhire and *Morrow*, for defendant in error. 1. The word "whore" imports *ex vi termini* a fornicatrix and an adulteress. (Johnson's Dic.; R. C. 1845, p. 1011.) 2. Words spoken slanderous in their character are *prima facie* maliciously spoken, unless proven to be true. 3. It was not necessary to prove the inuendo. (Starkie on Slander, 213, 216, 217; 4 Wend. 324; 5 Johns. 225; 19 Mo. 513.)

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RYLAND, Judge, delivered the opinion of the court.

This is an action for slander. The petition is according to the form under the new code of practice, and it charges that Polly Garner, the wife of the other defendant, Luke Garner, in the presence and hearing of Calvin Beck and divers other persons, on the first day of January, in the year 1854, at the county of Benton, spoke and published the following false and slanderous words, of and concerning the plaintiff; that is to say: "Go along home (speaking to plaintiff's son John) and see your whorish mother, and tell your mother to send you down to the south, to see your father Tom (intending then and thereby to charge the plaintiff with having been guilty of the crime of adultery with negro Tom). Your mother (speaking to the plaintiff's son John) is a whore, and I can prove it. Damn your black soul (speaking to plaintiff's son John); go along home to your whorish mother; you'll get to the south directly to your father; any how, Tom is your father. Your mother (speaking to plaintiff's son John) is nothing but a damned whore—G-d damn her whorish soul; she was nothing but a whore any how;" meaning then and there and thereby, that the plaintiff was a woman of lewd character, and that plaintiff had been guilty of the crime of adultery with said negro Tom: and concludes by laying her damages at the sum of ten thousand dollars.

The defendants appear and answer; deny the speaking of the words, and deny all the allegations of the plaintiff's petition. Upon the trial, the jury found the defendants guilty, and assessed the plaintiff's damages at the sum of three thousand dollars.

The defendants file their motion for a new trial, which was overruled; also their motion in arrest of judgment, which was likewise overruled. They excepted, and bring the case here by writ of error.

In looking into the bill of exceptions, the evidence preserved plainly establishes the speaking of the words; nor is there any

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error on the part of the inferior court in relation to the instructions given and refused.

The principal matters relied on by the plaintiffs in error for a reversal of the judgment, arise upon the plaintiff's petition. It is alleged that the suit is brought by Ursula Ann Hudson, a single woman, and the petition, by its inuendoes, charges the defendant, 1st, with intending to impute, by the speaking of the words, the crime of adultery to the plaintiff; that it nowhere appears that the plaintiff had ever been married, or had ever been in a situation to commit the crime of adultery; that, admitting the words are actionable in themselves, if spoken falsely and maliciously, whether they intended to impute either adultery or fornication, yet as the plaintiff, by inuendoes, has declared that Mrs. Garner intended, by speaking the words, to impute adultery, the plaintiff was bound to prove they were uttered in the sense thus ascribed to them. To support this view, various authors have been cited, which I will notice in proper time.

By our statute, it is actionable to publish, maliciously and falsely, in any manner whatsoever, that any person has been guilty of fornication and adultery. In this petition, the words are actionable of themselves; and there is no necessity for any colloquium, or any inuendo, to explain the meaning of such words.

In this petition, the plaintiff has not set forth what the pleaders call a colloquium. But, following the form which our new code of practice says may be used, she charges that Polly Garner, one of the defendants, "spoke and published the following false and slanderous words concerning the plaintiff." Then, after setting forth the words actionable in themselves, the plaintiff, by inuendo, charges that the defendant meant to impute the crime of adultery to the plaintiff. Can this inuendo be rejected and stricken out as surplusage? If it can, then the petition of the plaintiff may be considered sufficient to support the judgment, however carelessly and unprofessionally drawn.

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An inuendo is only explanatory of some matter already expressed; it may apply to what is already expressed, but can not add to or enlarge or change the sense of the previous words. (1 Chitty Plead. 437.) An inuendo, says Chitty, (1 vol. Plead. 438,) though it may, in the particular case, be unnecessary, "will sometimes limit and confine the plaintiff in his proof, to show that the slander had the meaning thereby imputed to it: thus, where the plaintiff alleged that he was treasurer and collector of certain tolls, and that the defendant spoke of him, as such treasurer and collector, certain words, '*thereby meaning that the plaintiff, as such treasurer and collector, had been guilty,*' &c., it was held that the plaintiff was bound by the inuendo to prove that he was treasurer and collector. If the words imported either fraud or felony, but by the inuendo they be *confined* to the latter, the plaintiff must prove they were spoken in the latter sense. The inuendo affixing a particular signification to the slander, should therefore never be unnecessarily adopted, as is too frequently the case. It is not unusual even, after setting out words which clearly of *themselves* import a charge of felony, to add, 'thereby then meaning that the plaintiff had feloniously stolen,' &c.; this is unnecessary, and, as it is a statement of a mere legal conclusion, is improper, though it may be surplusage." On the other hand, where *new* matter, introduced by an inuendo, without any *antecedent colloquium* or statement to which it can refer to support it, is altogether unnecessary to sustain the action, then the *inuendo* may be rejected as surplusage.

The case of Smith v. Carey, reported in 3 Campb. 460, is a very meagre one. The action is for slander of plaintiff in his trade. The words were, that "he lived by swindling and robbing the public." These were laid differently in different counts of the declaration; but in each count, there was an inuendo that the defendant thereby meant "that the plaintiff had been and was guilty of felony and robbery." The words were proved as laid, but appeared to allude to a transaction from which it might be inferred that the defendant only meant to

charge the plaintiff with *a fraud*. Lord Ellenborough said: "The words were, in themselves, actionable; and if there had been no such inuendo as to their meaning, the plaintiff would certainly have been entitled to a verdict; but the plaintiff was bound to show they were spoken in the sense he had ascribed to them; and if the jury should be satisfied they were spoken with intent to impute not felony, but merely fraud, there must be a verdict for the defendant." It is not in our power to see how the charge was made here: no doubt, though, the action was for words spoken against the plaintiff in connection with his trade, and that there was a colloquium charging the words as having been spoken of the plaintiff in his character and capacity of tradesman. The colloquium was necessary here, as the action was for slander of the plaintiff in his trade: then charging the words as having been spoken of the plaintiff and of his trade, and his conduct as tradesman, and by inuendo asserting the meaning of the words thus spoken to impute felony and robbery in the plaintiff in his trade, the inuendo made an important part of the charge; it gave the words their particular meaning. But such is not the case at bar, as I will hereafter show. The case of *Smith v. Carey*, therefore, is too meagre a report to be entitled to much weight.

The case of *Williams v. Hott*, (1 *Crompt. & Mees.* 675,) is reported at large, and, with the law laid down there, we have no hesitation in concurring. This was an action of slander for accusing the plaintiff of felonious embezzlement. The declaration contains five counts; at the commencement of the first there is a prefatory averment, that, before and at the time of the committing of the grievances thereafter mentioned, he had been and was employed as the *servant* of certain persons, to-wit, the mayor, aldermen and burgesses of Warwick, in a certain situation, office and employment, to-wit, the situation, office and employment of one of the chamberlains of the commons and commonable lands within the parish of St. Mary, in the borough of Warwick; by virtue and in exercise of which employment, it was the duty of the plaintiff to receive and take

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in his possession, from time to time, divers sums of money for and on account of the said mayor, aldermen and burgesses. This office of chamberlain was not averred to be a public office, nor was it so described that the court could ascertain whether it was a public office or not. The declaration then avers that the defendant, continuing to injure the plaintiff, and to cause it to be suspected and believed that he had been guilty of fraudulent and *felonious embezzlement*, and to subject him to the pains and penalties provided by the laws against persons guilty thereof, in a certain discourse which defendant then and there had of and concerning the plaintiff, *as such servant of said mayor, aldermen and burgesses*, and of and concerning the conduct of the said plaintiff, in his said employment, spoke and published of and concerning the plaintiff, and of and concerning the plaintiff's conduct, as such servant as aforesaid, in his said situation, office and employment, the words set out in the declaration. At the end of the count, there is an inuendo stating that the defendant meant that the plaintiff had fraudulently and feloniously, and against the form of the statute in that behalf, embezzled money received by him by virtue of his said employment.

The three first counts ascribed to the plaintiff the character of servant; they state the alleged slanderous words to have been spoken of the plaintiff as such servant, and they aver the meaning of such words to be, that the plaintiff had committed embezzlement against the form of the statute. Under the manner in which the plaintiff had charged the slanderous words to have been spoken, it was necessary that he should come within the statute relating to embezzlement. (7 and 8 Geo. IV, chap. 29, sec. 47.) The court held that the plaintiff did not come within the fair meaning of that statute; that he was not the servant of another, but fills an office of his own; that he did not receive money in the course of his employment as the mere agent of another, but was entitled, by virtue of his office, to keep the money in his hands until the end of the year for which he was appointed.

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The fourth count is differently framed ; it is not stated in that count that the plaintiff was the servant of any one, but that the words were spoken " of and concerning the plaintiff, and of and concerning the conduct of the plaintiff, in a certain employment, to-wit, the employment, situation and office of one of the chamberlains of the commons and commonable lands within the parish of St. Mary, in the borough of Warwick," and there is an inuendo similar to those contained in the preceding counts. It has been contended that this inuendo may be rejected, and that the plaintiff will then be entitled to a verdict ; but the court does not state what the nature of the situation of chamberlain is ; and, without knowing this, how can the inuendo be rejected ? You may reject on demurrer, or on motion in arrest of judgment, which is not warranted by the preceding allegations in the declaration ; and all the cases cited by the plaintiff's counsel are cases of this description. But the question here is, whether you may reject at the trial an inuendo which is good upon the face of the declaration. By such an inuendo, the plaintiff makes it a part of his case that the alleged slander bears the peculiar character which he assigns to it. In this case, the question was, whether the plaintiff was such a clerk or servant, or person employed in that capacity, as is embraced by the statutes concerning embezzlement. The Barons Bayley and Vaughan, who tried the case, thought that he was not ; and as the slander, by the colloquium and the inuendoes, was against him in that capacity, he having failed to show himself by evidence in that capacity, he could not recover. The inuendoes were sensible, and had a direct tendency to explain the charges as set forth, and as mentioned in the colloquium. But such is not the case at bar.

In *Harvey v. French*, (1 *Crompton & Mees*. 11,) a count for a libel stated that defendant published a false libel of and concerning the plaintiff, containing amongst other things the false, &c. matter, of and concerning the plaintiff ; that is to say, " Threatening letters. — The Middlesex grand jury have returned a true bill against a gentleman of some property, named

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French, (meaning the said plaintiff,)" with this inuendo : " That the said plaintiff will verify that the said defendant thereby, then and there meant to insinuate and have it understood, that the said plaintiff had been suspected to have been, and had been guilty of the offence of sending a letter, without any name or signature thereto subscribed, directed to one Trotter, threatening to kill and murder the said Trotter, a subject of the realm, with a view and intent to extort." This inuendo was held bad ; and it was also held that the matter was libelous without the inuendo, and that the inuendo might be rejected as surplusage. Lord Tenterden, chief justice, said : " We are of opinion, that the inuendoes in the 5th and 6th counts of this declaration are not warranted by the preceding words in those counts ; and all that goes before is, that a threatening letter had been sent by plaintiff ; but it by no means follows that a threatening letter has been directed to any person of the name of Trotter, or that it contained any threat to kill or murder the person to whom it was addressed, as averred in that inuendo. Unless, therefore, these counts can be sustained without the inuendo, the judgment ought to be reversed. We are however of opinion, that these counts, after rejecting that averment, may be sustained without it. Then, the count will stand thus : " Threatening letters.—The Middlesex grand jury have returned a true bill against a gentleman of some property, named French, (meaning the said plaintiff.)"

In *Roberts v. Camden*, (9 East. 95,) Lord Ellenborough, (who afterwards tried *Smith and Carey*, already cited from 3 *Campbell*,) held, that where such new matter was not necessary to support the action, an inuendo, without any colloquium, may well be rejected as surplusage, and can have no effect in enlarging the sense of the words used.

In *Beirer v. Bushfield*, (1 Watts, 23,) the words laid in the declaration to have been spoken were : " He was guilty with a woman, for he went into bed with Mrs. Kislar, and stroked her, and he could prove it ; thereby meaning that the said plaintiff had committed the crime of adultery with the wife of said

John Kislar." Gibson, chief justice, in delivering the opinion of the court, said: "The objection is, that the inuendo has carried the meaning of the words beyond their natural import, by converting them into a charge of adultery by a man who is not alleged to have been married. The office of an inuendo is, undoubtedly, to fix the meaning of the speaker, by a reference to something gone before, where the abstract sense of the words would otherwise fall short of an imputation of legal criminality; and it is a rule that where it enlarges the meaning, without such a reference to an imputation which subjects the accused to an indictment or civil disability, it is fatal to the count even after verdict. If simple fornication then were not an indictable as well as scandalous crime, I would say this declaration contains no cause of action. But if the charge of that crime or adultery will indifferently support an action for words, why should the plaintiff be bound to discriminate very nicely between the charge of the one or the charge of the other? But as no explanatory matter is laid as inducement, with which the inuendo can be coupled, why may it not be rejected as surplusage—the words being actionable without it? I admit it may not be done where the inuendo serves to make words actionable, which would otherwise not be so; for that would extract the sting from the charge as laid, and deprive the declaration of its substance. May it not be done, however, when explanation is superfluous, the words imputing a technical offence, by force of their intrinsic meaning? I know of no case which forbids it. The question, then, is, whether these words are actionable when stripped of the meaning assigned to them by the inuendo? By the modern decisions, the sense in which words are received by the world, is that which courts of justice are to ascribe to them: that question, then, can not admit of a doubt, for the words in this declaration convey to the popular apprehension a charge of fornication in terms less coarse, though not less explicit, than the most pointed that could be selected."

Whatever may formerly have been the rule, the law is now

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settled that, in actions of slander, the words are to be understood in their popular sense. It is too late to call on a court to tax its ingenuity to find out some sense in which the words might have been spoken innocently. That absurdity is exploded. In *Andres and wife v. Koppenheaver*, (3 Sergt. & Raw. 257) and in *Walter v. Singleton*, (7 Sergt. & Raw. 449,) it was held actionable to say of the plaintiff, "he (meaning the plaintiff) has committed fornication," notwithstanding the declaration avers that the plaintiff was, at the time of the uttering the words, a married man. In *Thomas v. Crosswell*, (7 Johns. 271,) Spencer, J., said: "An inuendo, as has often been decided, can not add or enlarge, extend or change the sense of the previous words; and the matter to which it alludes must always appear from the antecedent parts of the declaration; but when the new matter stated in an inuendo is not necessary to support the action, it may be rejected as surplusage."

The cases from Pennsylvania are very similar to this; there, the court held that the inuendo might be stricken out. In looking over the various decisions referred to by the counsel, and many others which an examination somewhat extended brought before me, I conclude that an inuendo, where there has been no colloquium or inducement laid by which the inuendo can become needful as an explanation, and when the words charged are actionable by themselves, may be rejected. The case from *Watt's Reps. of Beirer v. Bushfield*, is directly in point; there, the inuendo made the act to be adultery, and yet the plaintiff was not shown to be a married man. The words charged did not need an inuendo; there was no inducement—nothing which was necessary to be explained by the inuendo. It was rejected; Chief Justice Gibson stating "he knew no case which would forbid its rejection." In *Walton v. Singleton*, a married man was charged with committing an act of fornication; it was held actionable.

Here, the words charged were understood to mean an unlawful sexual intercourse, and the hearers must not be considered very nice in discriminating; they knew when a married woman

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was called "a whore," what she was charged with; when a single woman was called "a whore," what she was charged with: they also knew that it was the same act in each—the same criminal matter, though in one case it is called "adultery," and the other, "fornication." I conclude, therefore, that the inuendo, in this case, may be, and must be, stricken out.

There is no force in the objection made against the plaintiffs' withdrawing the testimony of Colvin Beck, and then introducing witnesses who knew more about the transaction.

When slanderous words are spoken of another falsely, the law will affix malice to them. There is no necessity of proving express malice.

The instructions given by the court to the jury were proper enough; they explained the law of the case, and the court properly overruled those asked for by the defendants.

In looking over the whole case, we find no error for which this court should reverse. The judgment below is affirmed; Judge Leonard concurring.

WHITE, Respondent, v. WALKER AND OTHERS, Appellants.

1. Under the practice act of 1849, where a statement of facts is agreed upon by the parties, no finding of facts is necessary.
2. Where a party prosecuted as a vagrant under the statute, (R. C. 1845,) is discharged, judgment for costs may be given against the informer.

Appeal from Greene Circuit Court.

Action in the nature of trover for the conversion of a mare. The defendants justified under an execution issued by a justice of the peace against the plaintiff, for the costs of a prosecution commenced upon his information against certain parties as vagrants, who were acquitted of the charge. The cause was submitted on an agreed statement of facts, which is set out in the opinion of the court. Upon this statement, a judgment for the

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value of the mare, which was found to be fifty dollars, was rendered against two of the defendants, viz. : Walker, the justice of the peace who rendered the judgment and issued the execution under which the mare was sold, and Ayres, the purchaser, from which those parties appeal.

Gardenhire and *Hendrick*, for appellants. 1. The facts not having been first stated in the decision of the court, the judgment must be reversed. (New Code, art. 15, § 2; 16 Mo. 129; 17 Mo. 550; 18 Mo. 109, 483; 19 Mo. 325; 20 Mo. 99, 132, 133, 262.) 2. White was the prosecutor by reason of being the informer, and was liable for the costs. (Act concerning costs, R. C. 1845, p. 248, § 4; act concerning vagrants, p. 1070, § 3.)

F. P. Wright, for respondent. 1. As the facts were agreed upon, no finding was necessary. 2. The 4th section of the act concerning costs in criminal proceedings does not apply to informers against vagrants, and they are not liable for costs.

RYLAND, Judge, delivered the opinion of the court.

The following agreed case was submitted by the parties to the court below for its decision, viz. : "Walker being a justice of the peace, upon the information and at the request of plaintiff issued his warrant against certain persons, under the vagrant act, as vagrants, and on a trial thereof, the above named plaintiff appeared and conducted, by leave of the court, the same against said supposed vagrants; and the vagrancy failing to be established, they were acquitted and discharged, and the said Walker, as such justice, rendered judgment against the above named plaintiff for the costs of said proceeding. Afterwards, said Walker, as such justice, at the instance of one of said supposed vagrants, issued an execution on said judgment for costs, and it was placed in the hands of Solomon Willis, who was the constable authorized to execute it; and said Willis, as such constable, levied said execution on, and by virtue thereof sold, plaintiff's mare mentioned in the petition,

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the sale being forbid by plaintiff; and said Ayres was the purchaser at the price of ———; that said Willis appropriated the proceeds of said sale, part to the payment of said judgment for costs, and tendered to said plaintiff the residue. Ayres removed said mare and appropriated her to his use; that said plaintiff forbid said sale of said mare at the time of said sale publicly; that said plaintiff afterwards demanded said mare of said Ayres, and that the damage, if any, is to be established by the court on further inquiry by testimony.

“WM. C. PRICE, Att’y for White, pl’ff.

“L. HENDRICK, Att’y for def’t.”

1. Upon this, the first question of importance is, does the agreed statement of facts do away with the necessity of the finding of the facts by the court? Every fact is agreed to, except the value of the mare sold; this was found by the court to be fifty dollars. When the facts are agreed to by the parties and submitted in writing to the court for its judgment, as to the law, there is no necessity for the court again to find the facts. They appear by the agreement. The only fact not agreed to here, was found by the court. So the record presents the facts agreed to and found. There is no weight, then, in the objection on this ground: the cases referred to by the plaintiff’s counsel, of *Brant v. Robertson*, 16 Mo. 129; *Bates v. Bower*, 17 Mo. 550; *Harper’s adm’r v. Phoenix Ins. Co.*, 18 Mo. 109; *Barberick v. Reid*, 18 Mo. 473; *Freeland v. Eldridge*, 19 Mo. 325; *State, to the use of Reyburn, v. Ruggles*, 20 Mo. 99; *Davis v. Rozier*, ib. 132; *Jamison’s adm’r v. Hughes*, ib. 133, and *Whyte v. Burnett’s adm’r*, ib. 262, are not similar to the one now before the court, and afford no strength to the objection on this point.

2. The next question is, had the justice of the peace authority to give judgment against the informer for the costs of the prosecution? By the 3d section of the statute concerning “Vagrants,” (R. C. 1845, p. 1070,) any justice of the peace of the county shall, upon information, or of his own knowledge, issue his warrant to the sheriff or constable to bring such per-

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son (that is, the supposed vagrant) before him. The 4th section prescribes the proceedings by which it is to be ascertained whether the person is a vagrant or not; and also the punishment for the offence. This punishment is a serious forfeiture; for it consists in depriving the vagrant of his right to manage and conduct himself as a freeman; and he is to be hired out for six months to the highest bidder, for cash in hand: he is virtually reduced to servitude for that time—a forfeiture not to be weighed, in the estimation of freemen, by dollars and cents. The statute concerning costs, (R. C. 1845, art. 2, p. 248-9, secs. 46 and 47,) must settle, for the most part, this question. The 4th section is as follows: "In all prosecutions for any fine, penalty or forfeiture instituted otherwise than by indictment, unless the same is commenced by the attorney general or circuit attorney, or some other officer whose duty it is to institute the same, the informer or person commencing the prosecution, although he may not be entitled to any part of the said fine, penalty, or forfeiture, shall be adjudged to pay all costs, if the defendant is acquitted." The 6th section: "In all cases except those in which death or imprisonment in the penitentiary is the sole punishment, when any person shall be committed or recognized to answer a criminal offence, and no indictment shall be found against such person, the prosecutor shall be liable for costs, unless the grand jury taking the matter in consideration shall determine that the county and not the prosecutor shall pay the same," &c. Sec. 7. "If a person charged with an offence not punishable with death or imprisonment in the penitentiary alone, shall be discharged by the officer taking his examination, the costs shall be paid by the prosecutor or person on whose oath or information the same shall have been instituted, unless the officer shall certify that there was probable cause for the prosecution, in which event they shall be paid by the county in which the offence was committed. When the prosecutor is condemned to pay the costs, the officer taking the examination shall issue execution for them forthwith, if demanded," &c.

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In our opinion, the last question is one of easy solution. The statute law of the state has expressly provided for such cases. Here, the prosecutor conducted the prosecution before the jury. It was originated by his information—the accused persons were discharged, having been acquitted by the jury, and the justice of the peace rendered judgment for the costs against the prosecutor, and issued execution for the collection of the same. On this execution the plaintiff's property was sold (he being the prosecutor), and the defendant, Ayres, purchased it. We hesitate not the least in saying that the justice of the peace, A. H. Walker, had jurisdiction and authority under the law of this state, upon the facts agreed to in this record, to issue the execution for the costs in the proceedings against the supposed vagrants, against the prosecutor in those proceedings.

The judgment of the Circuit Court against the defendants was consequently erroneous, and must be reversed; Judge Leonard concurring; Judge Scott absent—sick.

SKINNER AND OTHERS, Appellants, v. PLATTE COUNTY, Respondent.

1. An allowance against a county in favor of an individual, will not bear interest until the warrant has been presented to the county treasurer for payment, and the treasurer's endorsement is obtained that payment was not made for want of funds in the treasury, as required by statute.

Appeal from Platte Circuit Court.

The case sufficiently appears in the opinion of the court.

Vories, for appellant, insisted that the allowance was a judgment, or at least such a settlement of accounts that it bore interest from its date. (R. C. 1845, tit. Interest.)

Gardenhire, for the county. 1. Judgments at common law do not bear interest. (4 McCord, 212.) 2. The allowance

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is not a *judgment* within section 3d of the act regulating interest; nor is it a "settlement of accounts" within the 1st section of said act. County warrants bear no interest until they have been presented at the treasury and payment has been refused. (*Robins v. Lincoln county*, 3 Mo. 42.)

RYLAND, Judge, delivered the opinion of the court.

The question here is, will an allowance against a county in favor of an individual bear interest before the warrant against the county has been presented to the county treasurer for payment, and the treasurer's endorsement thereon, showing that payment was not made because there were no funds in the treasury to pay the demand? We think not. In order to draw interest, the warrant for the allowance must be made out and presented for payment to the treasurer; if he has funds to pay with, he pays the warrant without interest; if he has no funds to pay with, "he shall so certify on the back of the warrant, date and subscribe the same." (R. C. 1845, p. 311, sec. 6.) From this date the warrant will bear interest. Here, the plaintiffs claimed their demand against the county of Platte in 1851; the county court allowed them four hundred dollars; they were dissatisfied with the court for allowing no more, and refused to accept a warrant for the sum thus allowed them. In March, 1855, they moved the county court to grant them a warrant for the said allowance of \$400, together with interest thereon from the date of said allowance. This the court refused to do, so far only as respected the interest. The plaintiffs appealed to the Circuit Court; that court sustained the county court, deciding that the plaintiffs were not entitled to interest. The plaintiffs moved for a new trial, and being overruled, they excepted, and bring the case here.

The plaintiffs are not entitled to interest on the allowance in their favor. They refused to take the warrant; indeed, it may be said they refused to take the money. What right have they then to demand interest from the county? Can they, by their

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obstinacy, compel the county to remain their debtor, and this, too, at the expense of paying interest? Surely not. These county warrants do not bear interest until a demand is made for payment, and the treasurer's endorsement on the back of the non-payment because there are no funds.

By the act of 1849, the county warrants are made redeemable according to their respective dates. The treasurers are to pay the oldest outstanding warrants first, and no interest is to be allowed on any warrant after the money has been received into the county treasury sufficient for its redemption; but the treasurer shall set apart and keep the money sufficient for such warrant until it is called for by the holder of such warrant. (Acts of 1849, p. 37.) The plaintiffs have not the least pretence to demand interest on their claim. The judgment of the Circuit Court is affirmed; Judge Leonard concurring.

GUENTHER, Defendant in Error, v. BIRKICHT'S ADMINISTRATOR, Plaintiff in Error.

1. Where a step-son continues to reside in the family of his step-father after coming of age, as before, the law will not imply a contract to pay him for services rendered.

Error to Cole Circuit Court.

The case is stated in the opinion of the court.

M. M. Parsons and *H. Clay Ewing*, for plaintiff in error, that no contract was implied, cited *Williams v. Hutchinson*, 5 Barb., S. C., Rep. 122; 3 Comstock, 312; *Andrus v. Foster*, 17 Vermont, 556; 5 Watts & Seg. 513; 1 Parsons on Contracts, 257.

Gardenhire, for defendant in error, cited *Freto v. Brown*, 4 Mass. 675; 14 Pick. 512; 4 Wend. 403; *Story on Contracts*, § 11; 12 Wheaton, 341.

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RYLAND, Judge, delivered the opinion of the court.

This was originally a claim against the estate of Henry Birkicht, for seven hundred and twenty-five dollars, in favor of Frederick Guenther, presented to the Cole county court for allowance. The account consisted of two items—one for a demand evidenced by note executed by Birkicht to Guenther, for the sum of \$125; the other for four years' work and labor done for the deceased in his life-time by Guenther, at \$150 per year, making \$600.

The county court allowed the sum of \$725, the full amount of the account against the estate, and the administrator, Ewing, appealed to the Circuit Court of Cole county.

Upon the trial of the cause in the Circuit Court at the August term, 1855, the jury found the issues for the plaintiff, and assessed his damages at the sum of \$725. The administrator moved for a new trial, which being overruled, he excepted, and afterwards sued out his writ of error, and the case is now before this court on said writ of error.

From the bill of exceptions, it appears that Birkicht married the mother of the plaintiff, Guenther, who was a son by her former husband; that Birkicht moved from Germany to this state in 1841, and that his wife and his step-children moved out in 1842; that the plaintiff was sixteen or seventeen years old when he moved to this state with his mother in 1842; that he always lived with his step-father and his mother after her marriage with Birkicht, like one of the family; that he continued to live with them as one of the family until he went to California, in 1851; that he married and took his wife into the family and they lived as members of the family; that his wife had two children while living in the old man Birkicht's family; that Guenther worked as one of the family; that wages from 1847 were \$150 per annum for men; and that Guenther's work was worth \$150 per year. There was no proof of any promise to pay Guenther for his work—no agreement or under-

standing between the old man and his step-son in relation to this matter.

On the trial, the Circuit Court instructed the jury "that if they believed from the evidence that the plaintiff was the step-son of Birkicht, deceased, and performed work and labor for him after he was twenty-one years of age, the jury will allow plaintiff, in addition to the amount of the note, what such work and labor were reasonably worth, unless they find the demand is barred by the statute." "2. If the work and labor continued up to 1851, the amount is not barred by the statute of limitations, for such an account is not barred until five years after the last work and labor is performed."

The defendant objected to the first instruction, and asked the court to instruct the jury as follows: "That, if the jury believe from the evidence that the deceased, Henry Birkicht, was the step-father of the plaintiff, and that the deceased took plaintiff in his house while he was a minor, and the plaintiff continued to live at the house of the deceased as one of his family, the presumption of any obligation or promise on the part of deceased to pay plaintiff any thing for his services during the time he so lived with the deceased is rebutted, and it devolves on the plaintiff to prove to the satisfaction of the jury that the deceased promised to pay plaintiff for his services." The court refused to give this instruction, and the defendant excepted.

The main question here is, upon which party is the burthen of proof to show the understanding of the parties that plaintiff should be paid for his services after coming of age? Under the instructions given for plaintiff, the jury found for him. These instructions were to the effect that, upon the proof in the case, the plaintiff had made a *prima facie* case for recovery.

There is no controversy as to the plaintiff's right to recover on the note. The controversy alone rests on the item for four years' work and labor. This is for work and labor after the plaintiff becomes of age.

From the facts,—the plaintiff living in the family of the deceased as one of his children, and being provided for with his

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wife as such,—the presumption that he was to be paid for his services, implied by law under other circumstances, is repelled, and it devolves upon the plaintiff to show affirmatively, that such was the understanding of the parties. The first instruction, therefore, given for the plaintiff did not properly declare the law in this case. The relation of step-father and step-children being one of very common occurrence in life, it is thought proper to notice some of the general rules and provisions of law upon this interesting subject. In the case of *Williams v. Hutchinson*, (5 Barb., S. C., Rep. 122,) the Supreme Court of New York held that a person is not bound to maintain the child of his wife by a former husband; nor is he entitled, by law, to claim the services of such child, unless the latter chooses to render them. But if an individual does, in fact, maintain and support his step-child, in his family, and treats him as a member of it, the law, under such circumstances, will not imply a promise to pay the step-child for the services rendered; nor will it permit a recovery therefor, unless an express promise is shown, or something to prove that such was the expectation on both sides. The fact of the step-father standing in *loco parentis*, effectually repels all presumption of service for hire or wages, and renders an express promise indispensable to the maintenance of an action by the step-child. In this case, Johnson, J., in delivering the opinion of the court, said: "A person is not bound to maintain the children of his wife by a former husband. Not being bound to provide for them, or furnish them with any support, he is not entitled to their services, provided they choose to live elsewhere; and in the latter case, he can not recover for their services, either in his own right or that of the mother. While the mother remains a widow, she is bound to provide for her children, and is entitled to control them while under age, and to collect their earnings while in the service of others. But when she marries, her legal capacity is gone—she can no longer control the person or property, or earnings of her children. This was an action for labor and services. The plaintiff's mother

married the defendant when the plaintiff was about nine years old; the plaintiff then went to live with defendant with his mother. He resided there until he was about seventeen years old; he then left defendant and did not return. While he lived with defendant, he was treated, in all respects, as a member of his family—was clothed and schooled in the same manner as defendant's children were, and performed labor suitable for a person of his age and condition. There was no proof of any agreement or understanding that he was to recover wages and to account for his board, schooling and clothing, and no accounts were kept on either side. The only evidence on the subject of an understanding to pay was, that when the plaintiff and another brother were about leaving the defendant, the latter said 'he did not wish them to leave, and was willing to pay for what they had done.' It was a remark made by defendant in the presence of the plaintiff and his mother and other members of the family, but was not addressed to any one in particular. The court said there was no evidence in this case of any express promise to pay, and no proof that there was any expectation on either side, while the services were being performed, that payment was to be made or demanded. The remark proved to have been made by the defendant as the plaintiff was about leaving, 'that he did not wish him to leave, and was willing to pay for what he had done,' amounts to nothing more than the expression of a willingness on the defendant's part to pay the plaintiff for his services, if he would stay with him. It furnishes no evidence of any prior understanding or agreement, but, on the contrary, rather rebuts the presumption, as the remark was not particularly addressed to the plaintiff, and no question was raised or suggested by him about any pay. The case must, therefore, turn entirely upon the question, whether, under the circumstances of this case, the law will imply a promise on the part of the defendant. I think there can be no doubt that it will not. It is clear from this case, that the plaintiff lived with the defendant as a member of his family, in all respects, and was treated by the latter as one of

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his own children ; that, although the defendant was not bound to provide for him, or furnish him with any support, and was not entitled by law to claim the plaintiff's services, if he had not chosen to render them, yet that he did, in fact, support and maintain him in his family, and as a member of it, and stood in *loco parentis* to him. The books are full of cases to show that, under such circumstances, the law will not imply a promise to pay for services thus rendered, or permit a recovery, unless an express promise is shown, or *something* to prove that such was the expectation on both sides. (Robinson v. Cushman, 2 Denio, 149 ; Andrus and wife v. Foster, 17 Vermont, 556 ; Fitch v. Peckham, 16 Verm. 150 ; Swires v. Parsons, 5 Watts & Searg. 357 ; Wiers v. Wiers' adm'r., 3 B. Monroe, 645 ; Candors' Appeal, 5 Watts & Searg. 513 ; Wills v. Dunn, Wright, 134.)" I have extracted very copiously from this case. One of the judges—Wells—dissented. The doctrine, however, of the majority was afterwards sustained by the court of appeals of New York, in a case precisely similar, brought by a brother of the plaintiff against the same defendant. (3 Comst. 312.) Wells, J., in his dissenting opinion, places his dissent upon the ground that the services were rendered during the minority of the plaintiff ; he admits that the doctrine of the majority of the court is sustained by the authorities referred to, but says, that in those cases, the services rendered were rendered by adults, who were competent to contract or to consent to any arrangement upon which the law would imply a contract or agreement to pay or not to pay for services rendered, or to waive, either in express terms or by implication, any legal right which would otherwise vest. In the case in Comstock, Pratt, J., in delivering the opinion of the court, said, that "the parent is not legally entitled to the custody or earnings of his children after they arrive at the age of twenty-one ; nor is he entitled to the earnings of or bound to maintain his nephews or nieces ; yet, if they live with him as members of his family, without any contract or understanding that he shall pay for their services, or receive pay for their maintenance, the law will not imply a promise to

pay on either side." He then states the doctrine laid down by Wells, J., in his dissentient opinion, and declares that he can not concur in the conclusion to which the learned judge arrived. He continues: "A contract or promise to pay, as a matter of fact, requires affirmative proof to establish it. Under certain circumstances, when one man labors for another, a presumption of fact will arise that the person for whom he labors is to pay the value of his services. It is a conclusion to which the mind readily comes, from a knowledge of the circumstances of the particular case, and the ordinary dealings between man and man; but when the services are rendered between members of the same family, no such presumption will arise. We find other motives than the desire of gain, which may prompt the exchange of mutual benefit between them, and hence, no right of action will accrue to either party, although the services or benefits received may be very valuable. This does not so much depend upon an implied contract that the services are to be gratuitous, as upon the absence of any contract or promise that a reward should be paid. So far, then, as it depends upon any presumption of fact, the difficulty is as great or greater in the case of an infant than an adult." It is said that the law will imply a promise, in many cases, even against the will of a person sought to be charged, when reason and justice dictate that he should pay. This is true. But the difficulty is, in applying this doctrine to the circumstances of the case now before us. Do the facts show that the plaintiff rendered valuable services to the defendant for years after he became of age, without any corresponding benefits received by plaintiff? Is the calculation in dollars and cents the only consideration to be made in such cases? Here the plaintiff is brought from Germany with his mother, when he was about sixteen or seventeen years old; he lived with his step-father as one of the family; he married and brought his wife into the same family, and continued to live as members of the family; had two children, who were also treated as part of the same family. There are considerations growing out of the relation which the parties sus-

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tain to each other which can not be computed in money. To say nothing of the benefits derived from a father's care and a mother's love, of the thousand joys which can only be found by the dutiful child in that sacred sanctuary called home, is it nothing to be trained up in those habits of industry and in that knowledge of business which fit a child for the actual duties of life?

In *Swires v. Parsons*, the plaintiff brought the action against the administrator of Isaac Parsons, deceased, to recover compensation for work, labor and service performed for the intestate in his life-time. The proof was that plaintiff had lived for many years with the intestate, and performed the labor and service as alleged, and the witnesses testified that she lived with him as his wife, and was reputed as such. The action was brought in the common pleas of Center county, Pennsylvania. The president of the court was of the opinion that the plaintiff could not recover, and directed a verdict and judgment for the defendants. Upon error in the Supreme Court, this judgment was affirmed. Rogers, J., in delivering the opinion of the court, remarked, "that the evidence establishes one of two things—either that the plaintiff and intestate were married, or that she was living in a state of concubinage. Either position is fatal to the claim for compensation, unless, in the latter case, there was superadded proof of a contract of hiring, of which there is not a shadow of evidence. Without this consideration, however meritorious her services may have been in one respect, the action can not be sustained. The action of *assumpsit* is founded on a contract either express or implied; and as an express contract is out of the question, the action must be sustained, if at all, on the implied promise. But this can not be; for if a man work for another merely with a view to a legacy, he can not afterwards resort to an action of implied *assumpsit*. In *Osbourn v. The Governors of Guy's hospital*, (2 Strange, 728,) where this principle was first ruled, it is said: 'The court must consider how it was understood by the parties at the time of doing the business, and the man who expects to be

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made amends by a legacy can not afterwards resort to an action.' It is enough for the plaintiff *prima facie* to show labor performed, to raise an implied assumpsit to pay for it. But the facts in evidence rebut the implication of a promise, which would otherwise arise; for the relation which they bore to each other is inconsistent with any understanding for compensation. It is a situation in which she voluntarily placed herself, and she must rely upon his bounty for support." (5 Watts & Sergt. 357.) In Andrus and wife v. Foster, (17 Verm. 556,) it appeared that the plaintiff's wife, being a niece of the defendant, and taken by him when she was a child to live with him until she became of age, was told by defendant, when she arrived of age, that she was free to go, if she chose; but that if she remained and did well, he would do well by her; she thereupon continued to reside with him for about six years as a member of the family, and was uniformly treated as she was before she became of age, neither party keeping any accounts. The plaintiff then left the defendant and went to New Hampshire, and continued to reside there, without any expectation of returning, for about five years, when, at the request of the defendant, she returned and worked for him and his family for about a year. It was held by the court that she was not entitled to recover compensation for her services during the time which elapsed after she became of age and before she went to New Hampshire, but that she was entitled to pay for her services rendered for defendant after she returned from New Hampshire. This case lays down the rule that when a daughter continues to reside in the family of her father after the age of majority the same as before, the law implies no obligation on the part of the father to pay for her services. The cases cited by the counsel for the plaintiff below, from Massachusetts Reports, do not militate against the doctrine of the cases from New York, Pennsylvania and Vermont. By the Massachusetts case of Freto v. Brown, (4 Mass. 675,) it is held, that a minor, whose father is dead, and whose mother afterwards marries, is entitled to his earnings in the service of a third person.

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The father-in-law may have an action on an implied assumption for necessities, but can not claim his earnings against the minor's consent. Worcester and wife v. Marchant, (14 Pick. 510,) is to the same effect. As this case must go back to the Circuit Court, we would not be understood as laying down the law so as to require the plaintiff to produce proof of an *express* promise on the part of Birkicht to pay the plaintiff for his services after he became of age, or to produce proof of a *specific contract* for that purpose; but we say the burthen of proof is on the plaintiff to show, to the satisfaction of the jury, that such was the understanding of the parties. The merely performing work and labor, as a member of the family, after the plaintiff became of age, he having lived with his mother and step-father for a long time before and after that event as one of the family, and having been treated as one of the family, is not sufficient to raise the implied promise. But as the request made to the niece to return from New Hampshire and again live with the uncle, in the case from Vermont, and her compliance with such request, were considered as warranting the courts in raising an implied promise to pay for the work and services of the niece after her return,—so in this case, any facts which the plaintiff can offer, in order to show that it was the expectation or understanding, after he became of age, by the step-father and himself, that he was to be compensated for his work and labor, will be proper; and if such proof be sufficient to warrant the jury in coming to the conclusion that such was the understanding or the expectation of both parties, then the law will compel the administrator, Ewing, to pay to plaintiff the reasonable worth of such services under the circumstances.

The judgment of the Circuit Court is reversed and this cause remanded, to be proceeded in further, in accordance with the principles expressed in this opinion; Judge Leonard concurring; Judge Scott absent by reason of sickness.

THE STATE, Defendant in Error, v. LEONARD, Plaintiff in Error.

1. It lies in the discretion of the court, whether it will compel the State to elect the count of an indictment on which the defendant shall be tried. (State v. Jackson, 17 Mo. 544. affirmed.)
2. An indictment, under the 38th section of article 2 of the act concerning crimes and punishments, (R. S. 1845, p. 351,) which charges that the defendant feloniously assaulted and wounded M. D., wife of D. D., with a large stone held in his hand, &c., alleged to have been a deadly weapon, likely to produce great bodily harm and death, and her the said M. D. did then and there strike, beat, wound, and ill-treat with great force, which was likely to produce death, &c., is sufficient. The words "with intent her the said M. D. then and there to wound and ill-treat," may be rejected as surplusage.
3. As to what constitutes a wounding within section thirty-eight of article two of act concerning crimes and punishments.
4. State v. York, *infra*, p. 462, affirmed.

Error to Dent Circuit Court.

The opinion of the court is sufficiently full in the statement of the facts.

Arnold, for plaintiff in error.

Gardenhire, for the State.

RYLAND, Judge, delivered the opinion of the court.

This is an indictment against the defendant, under the 34th and 38th sections of the second article of the act concerning crimes and punishments, (R. C. 1845, p. 350, 351). The defendant appeared and pleaded not guilty. Upon a trial, the jury found the defendant guilty on the first count of the indictment, and not on the second,¹ and assessed his punishment at a fine of five hundred dollars.

The only questions then that arise in this case are on the first count, and these questions, giving the defendant the benefit of every thing that is found on the record, relate in the first place to the refusal of the court to compel the state to elect which count of the indictment she would proceed under; in

the second place, as to the propriety of the instructions given and refused; and lastly, as to the sufficiency of the indictment.

1. The first point, as to the election of the count in the indictment under which the state shall proceed, has been settled by this court against the defendant, in the case of the State v. Jackson, 17 Mo. Rep. 544; see also 3 Hill's Rep. 160. This point is therefore ruled against the defendant.

2. The indictment has two counts—the first is under the 38th section of article 2d, act of 1845, crimes and punishments; and the second under the 34th section of the same article. We have nothing to do with the second count, the jury finding the defendant not guilty under that count. The first count then charges (throwing off the verbiage) that the defendant feloniously assaulted and wounded Malissa Davenport, wife of David Davenport, with a large stone held in his hand, &c., alleged to have been a deadly weapon, likely to produce great bodily harm and death; and her the said Malissa did then and there strike, beat, wound, and ill-treat with great force, which was likely to produce death, &c. This is the substance of the charge. This, we think, is sufficient under the 38th section of article 2, above mentioned. The indictment is informal, but we think substantially good. The words, "with intent her the said Malissa Davenport then and there to wound and ill-treat," we think may be thrown off as surplusage; they form no part of the description of the offence; it is substantially set forth without them.

3. As to what constitutes a wounding under this statute, we may suppose from the evidence that the prosecutrix was wounded in the legal sense of the term; for, she says, that "there is a scar left still," made by the wound. In *Rex v. Payne* and another, it was held, if a person strike another with a bludgeon, and break the skin and draw blood, it was a sufficient wounding to be within the statute 9 Geo. IV, ch. 31, sec. 13. Under this act, it is not at all material what the instrument is with which the party is wounded. The punishment under this statute of 9 Geo. IV, chap. 31, sec. 12, was in some cases death;

a wound from a kick with a shoe on, will be within the same statute. (See *Rex v. Briggs & Briggs*; 1 Moody's Crim. Cas. 318.) In criminal cases, the definition of a wound is an injury to the person by which the skin is broken. *Moriarty v. Brooks*, 6 Car. & Pay. 684 (25 Eng. Com. Law, 598) per Lord Lyndhurst, C. B.; *Rex vs. Withers*, 4 Car. & Pay. 446 (19 Eng. Com. Law, 466). Inflicting a wound on a person by throwing a sledge hammer at him, is a wounding within 9 Geo. IV, chap. 31, sec. 11 & 12, although the sledge hammer from being blunt, was not an instrument calculated to inflict a wound. Dr. Johnson defines a wound to be "a hurt by violence." In the case before us, the instrument was a stone about the size of the fist of a woman—for thus the witness described it—and it was thrown with such violence as to knock the woman down; and when she was afterwards examined on the trial as a witness, about a year after she received the blow, she said, "it bruised me severely; there is a scar there yet." There can be no doubt, then, of this being a wound, under the 38th section of the act aforementioned. This settles the point in regard to the indictment; it is sufficient, and we think the wound was one embraced by the statute.

As to the instructions, we see no error in those given to the jury; nor did the court err in refusing to give those refused. Although if the charge had been of an intent to kill one person, it would not have been sufficient to prove a different intent; as, to kill another person, yet in this case there was no such charge; at least in the first count, under which the defendant was convicted; and the instruction as applicable to that count was correct.

4. In regard to the motion in arrest of judgment, because Dent county was formed unconstitutionally, and is therefore no county in the eye of the law, we refer to what has just been said in the case of the *State v. York & York*, from the same county, and also to *State v. Rich & Rich*, 20 Mo. Rep. 393. In looking over the record in this case as well as record in the case of *York & York*, just decided, we might have justified our-

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selves in dismissing the writ of error in both cases, without wading through a mass of papers bundled together without regard to sense, priority of date, or any thing but mere chance. But we examined, and assorted, and arranged the matters as much as was in our power, and concluded to pass upon the the cases on their merits as far as we could ascertain them.

Upon the whole record, then, we find no error authorizing us to reverse the judgment below.

The judgment is accordingly affirmed ; Judge Leonard concurring.

THE STATE, Appellant, v. HAMBLETON, Respondent.

1. An indictment, under section 57 of article 3 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendant "did unlawfully, wilfully, maliciously and feloniously kill a *certain horse beast*, to-wit, *one mare*, then and there the property of one A. B.," &c., is sufficient. Courts will take judicial notice, that horses are included in the term "cattle," as used in that section.
2. In such an indictment, it is not necessary to charge malice against the owner of the animal killed, nor to state the manner of killing.

Appeal from Polk Circuit Court.

The indictment, which is set out in the opinion of the court, being quashed below, the circuit attorney, on behalf of the State, appealed to this court.

Gardenhire, (Attorney General,) for the State.

F. P. Wright, for respondent. 1. The indictment does not follow the words of the statute. It should have charged the defendant with killing *certain cattle*, instead of a *certain horse beast*. (2 Hawk. ch. 25, § 110.) 2. The indictment is also defective in not charging *malice* against the owner, or otherwise describing the offence, so as to have made it apparent that the act was malicious. (State v. Jackson, 22 Iredell's Rep. 329.) 3. The indictment is also bad in not charging the

manner of killing. (1 Archbold's Crim. Pl. 86, note 1; 2 Hale, 183, 184, 187, note; Hawk. B. 2, C. 25, § 57.)

RYLAND, Judge, delivered the opinion of the court.

The only question in this case is upon the sufficiency of the indictment, which is as follows, to-wit:

"State of Missouri, county of Polk. In the Circuit Court, October term, A. D. 1853. The grand jurors for the State of Missouri, sworn, and charged to inquire for the body of the county of Polk, upon their oath present, that Montraville Hambleton, late of the county of Polk aforesaid, on the 10th day of September, in the year of our Lord eighteen hundred and fifty-three, at the county of Polk aforesaid, did then and there unlawfully, wilfully, maliciously and feloniously kill a certain horse beast, to-wit, one mare, then and there the property of one Albert Bryant, of the value of fifty dollars, contrary," &c.

This indictment was demurred to by the defendant. The demurrer was sustained. The indictment is founded on the 57 §, 3 art. of stat. concerning crimes and punishments. (R. C. 1845, p. 364, § 57.) "If any person shall wilfully and maliciously kill, maim, or wound any cattle of another, he shall on conviction be punished as in the next preceding section is provided:" that is, by imprisonment in the penitentiary not exceeding three years, or in the county jail not less than six months, or by fine not less than two hundred and fifty dollars, or by both a fine not less than one hundred dollars, and imprisonment in the county jail not less than three months.

The defendant's counsel in this court contends, that the indictment is insufficient, because it does not follow the words of the statute. The averment should have been *certain cattle*, instead of a *certain horse beast*. In the second place, it is defective in not charging malice against the owner, or otherwise describing the offence, so as to have made it apparent to the court that the act was malicious. Thirdly—the indictment is bad in not setting out the manner and means of killing.

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We do not think any of the objections to the indictment well taken. The offence is sufficiently charged. In the Crown Circuit Companion, an old but a most excellent book for a circuit attorney, we find the form of an indictment for feloniously and maliciously killing a gelding. The substance is as follows: "One black gelding of the price of fourteen pounds, of the goods and chattels of one J. J., in a certain field belonging to him the said J. J., then and there being, feloniously, unlawfully, wilfully and maliciously, then and there did kill and destroy, to the great damage of him the said J. J., against the form, &c., and against the peace, &c." (Cr. Cir. C. 83.) The pleader has not here pretended to describe the means used to kill, nor has he described the manner and mode of killing.

The expression in the statute, "any cattle," is broad and ample enough to embrace the animal killed in this case, and there was no necessity to use the words "certain cattle." A certain "horse beast, to-wit, one mare," is particular and descriptive enough. Indeed the counsel for the defendant does not pretend to deny that the word "cattle" includes horses in this section of the statute. Our statute, that is, the 57th section before cited, is almost a literal copy of the 7 & 8 Geo. IV, chap. 30, § 16, so far as it regards the description of the offence. The English statute declares, "that if any person shall unlawfully and maliciously kill, maim or wound any cattle, &c." Ours has the word "wilfully," instead of "unlawfully." Now, under this statute, the word cattle embraces horses, mares, colts, bulls, oxen, cows, heifers, calves, &c. In *Rex. v. Chalkley*, 1 Russ. & Ry. C. C. 258, the defendant was indicted, under 9 George I, ch. 22, for killing certain cattle, to-wit, "one mare." The court held, that to charge the defendant with killing "certain cattle," without stating what kind of cattle, would not be sufficient. The indictment in the first count charged "that John Chalkley, on the 12th day of September, 1813, at Horsney, certain cattle, to-wit, *one mare*, price £5, the property of Edward Kimpton, unlawfully, wilfully, maliciously and feloniously,

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did kill, against the statute, &c." Here we also see that the pleader has not thought it necessary to describe the mode of killing, or the means or instrument used for that purpose. The defendant in this case was convicted; but because the evidence showed the animal killed was a colt, and did not show its sex, all the judges held, that it was not sufficient to support the charge of killing a mare. They also held, that it was necessary to specify in the indictment the particular species of cattle killed or maimed.

In the case of *Taylor v. State*, 6. Humph. (Tenn.) 285, the defendant was indicted under a statute of Tennessee, which provided, "that if any person shall wilfully or maliciously kill, or destroy, or wound the beast of another, he shall be fined not exceeding two hundred dollars, and be imprisoned not exceeding three months." The indictment, charged that Taylor, "on the 16th of December, 1844, in Davidson county, did wilfully and maliciously kill a cow, of the value of five dollars, the property of William Watts, contrary to law, &c." Upon this indictment, Taylor was tried and found guilty, sentenced to pay a fine and be imprisoned. He moved in arrest of judgment, which being overruled, he appealed to the Supreme Court. In the Supreme Court, it was insisted that the indictment was bad, because it was not alleged that the animal killed was a "beast;" but the court said the word "beast," here used, is a generic term, and includes all animals of that description. The indictment described the specific animal killed, and the animal so described is a "beast," and by necessary consequence the indictment charged that the defendant killed a "beast." The court affirmed this judgment. In this indictment, no mention is made of the means used to kill, nor of the manner or mode of using the means.

In *Regina v. Tivey*, (1 Denn. C. C. 64,) the prisoner was tried before Mr. Justice Patteson, at the Derby Winter Assizes, 1844, and convicted on an indictment charging him with unlawfully, maliciously and feloniously wounding a mare, the property of Richard Beaumont Child. This indict-

ment was under the statute 7 & 8 Geo. IV, ch. 30, § 16, before cited. The fact of wounding was clearly proved, but no evidence as to the motive of the prisoner. No malice was shown towards any one, and it did not appear that he knew to whom the mare belonged, or had any knowledge of the prosecutor, Richard Beaumont Child. The prisoner's counsel urged, that evidence of malice was necessary since 1 Vic. ch. 90; the learned Judge held that it was not, and his brother Judges, Denman, C. Justice, Pollock, C. B., Coleridge, Coltman, Rolfe, Erle, and Platt, concurred with Patteson. In *Rex v. Salmon*, (1 Russ. & Ry. C. C. p. 26,) it was held, that, in an indictment for setting fire to a hay-stack, under 9 Geo. I, ch. 22, it is no answer to the charge that the prisoner had no malice or spite to the owner of the stack. In the case of the *State v. Jackson*, (12 Iredell's Rep. 329,) was an indictment for malicious mischief. The court held the indictment bad, because it omitted the word "mischievously." This may be required by the statute. It is no authority to say that such a word is necessary under the statute for killing, maiming, or wounding cattle. Nor do we think, in such indictments, it is at all necessary either to charge express malice against the owner of the cattle, or to describe the manner, mode, and instrument with which the offence was perpetrated.

That the word "cattle" may be so used by our legislature as to exclude the idea of horses, mares, colts, &c., we will not pretend to say; but that when used as it is in this 57th sec. of art. 3d of our Criminal Code, it embraces horses, mares, colts, &c., we think can not be for a moment doubted. One remark more about the malice in these case and I will have done. In the case of *Bromage* and another v. *Prosser*, (4 Barn. & Cress. 247; 10 Eng. Com. Law, 321,) Bailey, J., in delivering the opinion of the court, said: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it intentionally and

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without just cause or excuse. If I maim cattle without knowing whose they are—if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act and done intentionally.” It would be well to notice the distinction between the common acceptation of the term malice and the legal sense of the same.

In this case, we consider the indictment substantially good, and that the court below erred in sustaining the defendant’s demurrer to it. The judgment of the circuit court is reversed, and this cause is remanded for further proceedings in accordance with this opinion. Judge Leonard concurring; Judge Scott absent.

THE STATE, Plaintiff in Error, v. CRENSHAW, Defendant in Error.

1. Buffaloes, although domesticated, are not “cattle” within section 57 of article 3, of the act concerning crimes and punishments. (R. C. 1845, p. 364.)

Error to Greene Circuit Court.

The facts fully appear in the opinion of the court.
Gardenhire, (attorney general,) for the State.
Hendricks and *Wright*, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for killing feloniously, wilfully, unlawfully and maliciously one buffalo bull, a domesticated animal, of the value of fifty dollars, of the goods and chattels and property of Benjamin Canefox.

There were three counts in the indictment; in the first and second, the offence is not charged correctly; but in the third

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count it is. The defendant appeared and moved to quash the indictment ; the court sustained this motion, and the State excepted, and brings the case here by writ of error.

The third count of this indictment being considered sufficiently formal and substantially good, raises, before this court, the question, whether a buffalo bull was within the meaning of the legislature, when they used the word "cattle," in the 57th section of article 3, of statute of crimes and punishments, (R. C. 1845, p. 364,) or not. This section is as follows : "If any person shall wilfully and maliciously kill, maim or wound any cattle of another, he shall, on conviction, be punished," &c. Here, the word is used by the legislature in the broadest sense—cattle embracing horses, cows, sheep, mules, &c. In another section of the same statute, article 8, sec. 38, "Every person who shall maliciously and cruelly maim, beat or torture any horse, ox or other cattle, whether belonging to himself or another, shall, on conviction," &c. We have no doubt that they meant to include horses under this general phase, cattle.

We do not think that the legislature meant to include buffaloes under the word "cattle." Buffaloes are not cattle yet within the meaning of the statute ; and the fact that this buffalo bull was tamed, if it be so, does not bring him within the provision of the law, and while his tribe is left out. Though it be admitted that persons may have buffaloes tamed and domesticated, may lawfully acquire property in them, and can maintain suits for injuries done them, or for the destruction of them, yet the courts must look to the general state of things and to the circumstances attendant on any general legislation, and give such construction to the words of the law as to enable them to embrace the ideas and notions and designs of the law-makers. Although it may prove a loss to the owner, and is of itself a serious outrage, maliciously and wilfully to destroy a domesticated buffalo, yet we are inclined to the opinion that the legislature never meant to embrace those animals under the general word "cattle." A tame domesticated buffalo bull is

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not then under the provisions of this statute. He can not be brought within the provisions while his family is left out.

The judgment of the court must therefore be sustained; Judge Leonard concurring.



THE STATE, Defendant in Error, v. RAGAN AND ANOTHER,
Plaintiffs in Error.

1. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendant, on, &c., at, &c., did then and there unlawfully bet property of a specified value on the result of an election which was held in a certain congressional district, in this state, on a specified day of the year, between specified parties, who were then and there running as candidates to represent the state in congress, said election then and there being authorized by the constitution of the United States and by the laws of this state, is good.

Error to Newton Circuit Court.

J. W. Payne, for plaintiffs in error. The indictment is defective in not charging that an election was held for the election of a member to congress, and that John S. Phelps and Waldo P. Johnson were then running as candidates for said election.

Gardenhire, (attorney general,) for the State.

RYLAND, Judge, delivered the opinion of the court.

This was an indictment founded on the 27th section of the 8th article of the act concerning crimes and punishments. (R. C. 1845, p. 404.) The defendants appeared and moved the court to quash the indictment; which motion was overruled and excepted to, and saved by bill of exceptions. The defendants then pleaded not guilty—were tried and found guilty, and fined each one dollar. There is a motion on the record to arrest the judgment, which also was overruled. The defendants

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bring the case here by writ of error, and insist, by their counsel, that the indictment is insufficient.

The indictment is as follows : " State of Missouri, county of Newton — In the Newton Circuit Court, October term, 1854. The grand jurors for the state of Missouri, empanelled, sworn and charged, &c., upon their oath, present that one Caleb Ragan and George W. Cornits, late of said county, heretofore, to-wit, &c., at, &c., did then and there unlawfully bet an amount of property, to-wit : one pair of boots, of the value of five dollars, on the result of an election which was held in the sixth congressional district in the state of Missouri, on the first Monday in August, A. D. 1854, between one John S. Phelps and Waldo P. Johnson, who were then and there running as candidates to represent the said congressional district in the state of Missouri, in the congress of the United States of America ; said election then and there being authorized by the constitution of the United States of America, and by the laws of the state of Missouri, contrary," &c.

The 27th section of article 8 of act concerning crimes and punishments, (R. C. 1845,) is as follows : " Every person who shall bet or wager any money or property or other valuable thing on the result of any election, authorized by the constitution or laws of the United States or of this state, or on any vote to be given at such election, or who shall knowingly become stake-holder of any such bet or wager, shall be punished by fine not exceeding fifty dollars." We consider this indictment good ; and that there is nothing in the objection taken to it by the counsel for the defendants. It substantially pursues the words in which the offence is described in the statute, and the court below very properly overruled the defendants' motion to quash and in arrest.

Let the judgment be affirmed ; Judge Leonard concurring.

THE STATE, Respondent, v. BANFIELD, Appellant.

1. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the election was for a probate judge of the county, and was held on a specified day, and was authorized by the laws of the state, is sufficient, the statute showing that the day named was the one fixed by law.

Appeal from Greene Circuit Court.

No appearance for appellant.

Gardenhire, (attorney general, for the State,) referred to R. C. 1845, p. 404, § 27, and Sess. Acts, 1847, p. 40, 41, 42, § 1 and 9.

RYLAND, Judge, delivered the opinion of the court.

This was an indictment founded on the 27th section of the 8th article of the act concerning crimes and punishments, (R. C. 1845, p. 404.) The defendant is charged with betting a pair of boots with James Morrison, on the result of an election which was holden on the first Monday in August, A. D. 1855, in the county of Greene and state of Missouri, for the office of probate judge, within and for said county; one James Dollison and George W. Mitchell being then and there candidates for the said office of probate judge; said election being then and there authorized by the laws of the state of Missouri. The time charged in the indictment, when the bet was made, was the 25th July, 1855.

The defendant, Banfield, appeared and moved to quash the indictment: his motion was overruled. He then plead guilty and was fined ten dollars by the court. He then moved in arrest of judgment, which being overruled, he appealed to this court and now insists upon the insufficiency of the indictment. We think the indictment substantially good. The public law has created the office of probate judge for Greene county, and fixed the time for electing the probate judge. The first election

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for this office was held on the first Monday in August, A. D. 1847, and the elections are to take place every two years thereafter. Consequently, the first Monday in August, 1855, was the day for said election of probate judge for said county of Greene. The indictment charges that the said election was then and there authorized by the laws of the state of Missouri.

The indictment being good, the judgment of the court below must be affirmed ; Judge Leonard concurring.

THE STATE, Defendant in Error, v. YORK & YORK, Plaintiffs
in Error.

1. The constitutionality of a law establishing a new county can not be inquired into upon a motion to quash an indictment found in a court of such county. (State v. Rich, 20 Mo. 393, affirmed.)
2. An indictment under the 37th section of the 2d article of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendants (Y. & Y.) "on, &c., at, &c., upon the body of one J. M. J., then and there being, and assault did then and there unlawfully and feloniously make, and the said Y. & Y., with sticks, rocks, stones and knives, then and there, being deadly weapons, &c., in and upon the head, face and body of him, the said J., then and there did assault and beat, with the intent him, the said J., then and there feloniously to kill, contrary," &c., is good.

Error to Dent Circuit Court.

J. R. Arnold, for plaintiff in error.

Gardenhire, (attorney general,) for the State.

RYLAND, Judge, delivered the opinion of the court.

This was an indictment for a felonious assault. The defendants appeared and pleaded not guilty. They were convicted and fined each the sum of five hundred dollars. A motion for a new trial was made and overruled. A motion likewise in arrest of judgment was made and overruled. Exceptions were taken and the case was brought here by writ of error.

We have endeavored in vain to get such a record here as would enable us to see what was done in the Circuit Court. We see a line or two of the evidence put down in the record, in what we suppose was meant for a bill of exceptions ; but the clerk says this was not all the evidence ; but he can not copy any more, because it was not saved or put down in writing. It is not the clerk's duty to save the evidence. It is the duty of the party excepting, either the circuit attorney, or the defendant's attorney.

There being here no evidence saved, it is not in our power to say whether the instructions were proper or not. Indeed we can not tell which were given or which refused. Some have marks near to them on the margin, thus, "+"; others, the word "rejected" on the margin ; others, both the cross mark and the word "rejected." But the record nowhere states which were given or which refused. The indictment is copied in the record some three or four times, in answer to the various writs of *certiorari* which were from time to time awarded, and the reasons in arrest of judgment are also very prominent in the various efforts to complete the record.

From the reasons in arrest of judgment, a very important item, one indeed which was, in all probability, the ruling cause of bringing the case before this court, is the unconstitutionality of the county of Dent. There is nothing on the record to raise or support this question, and it strikes us as a novel proceeding for any of the courts of this state to undertake to kill off any one of the counties of the state established by law, by a mere motion in arrest of judgment in a criminal case for a misdemeanor. (See the case of the State v. Rich & Rich, 20 Mo. 393.) The motion for a new trial, on account of newly discovered testimony, has nothing in it. The record nowhere shows what the newly discovered testimony is ; we therefore can not pass upon the action of the inferior court in overruling the motion. We have disposed of all the questions before us which we can see upon this record, except the sufficiency of the indictment. We will now consider this question. The in-

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dictment, in our opinion, is sufficient. The charges that Asa York and John York, both late of the county of Dent, on, &c., in and upon the body of one James M. Jones, then and there being, an assault did then and there unlawfully and feloniously make, and John York, with sticks, rocks, stones and knives, then and there being deadly weapons, &c., in and upon the head, face and body of him, the said Jones, then and there did assault and beat, with the intent him, the said Jones, then and there feloniously to kill, contrary, &c.

We think that this indictment is substantially good and sufficient. It is under the 37th section of the 2d article of the act concerning crimes and punishments. Here, the weapons used are averred to be deadly weapons; the beating is alleged to have been done on the head, face and body, and done with the intent of feloniously to kill. Had the killing taken place here, a felony would have been committed. There is nothing then in the motion to arrest on account of the insufficiency of the indictment. (See *Carrico v. State*, 11 Mo. 599; *Jennings v. The State*, 9 Mo. 862; *The State v. McGrath and others*, 19 Mo. 678; *Johnson v. The State*, 7 Mo. 183.)

The judgment of the Circuit Court must be affirmed; Judge Leonard concurring.

THE STATE, Respondent, v. SLATER, Appellant.

1. A married woman, who has been abandoned by her husband for five years, may properly be charged as the head of the family whose peace is disturbed, in an indictment under section 15 of article 7 of the act concerning crimes and punishments (R. C. 1845).

Appeal from Newton Circuit Court.

The case is stated in the opinion of the court.

Hendrick, for appellant, insisted that there was a variance between the indictment and proof.

Gardenhire, (attorney general,) for the State, that there was no variance, cited 3 Humph. 216; 17 Ala. 486; 20 Mo. 75; R. C. 1845, p. 478, § 13.)

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted in the Newton Circuit Court for disturbing the peace of the family of Mary Riggs.

The defendant appeared to the indictment, and upon the trial thereof the State gave evidence "that the defendant, about the 26th or 27th July, 1854, in the night time, disturbed the peace of Mary Riggs and her children, residing and being with her in the said house, for which family she had provided and acted as head of the family since the desertion and absence of her husband, by there making loud and unusual noise, loud and indecent conversation, and by threatening to kill her son, Ira Riggs, and that he would spill his blood in the yard; and that he would have satisfaction for the money he had to pay by the proceedings of Ira Riggs had against him, by spilling his blood in her sight. It was also proved that Mary Riggs was a married woman; that her husband had not lived with her for the last five years; that some five years ago he left her, and took up with another woman and went off—had been seen in the neighborhood some two and a half years since, but had not been heard of since then; she never expected him to return, and if he did return she did not expect to live with him again.

The defendant objected to this evidence as not proper to go to the jury, and moved the court to exclude it from the jury. The court overruled this motion, and permitted the evidence to go to the jury. The defendant excepted, and after a verdict of the jury finding him guilty, he moved for a new trial, which being denied, he brings the case here by appeal.

The only question for our consideration is, was the evidence proper and legal to go before the jury? The 15th section of the 7th article of the act concerning crimes and punishments, (R. C. 1845, p. 396,) declares that "If any person or persons shall, in the night time, wilfully disturb the peace of any

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neighborhood, or of *any family*, by loud and unusual noise, loud and offensive or indecent conversation, or by threatening, challenging or fighting, every person so offending shall, upon conviction, be adjudged guilty of a misdemeanor, and be punished," &c. The indictment charges that the defendant did, in the night time, with force and arms, unlawfully and wilfully disturb the peace of the family of Mary Riggs, by then and there making loud and unusual noise, &c. The family disturbed was charged to be the family of Mary Riggs. The defendant objected to the evidence, because it shows Mary Riggs was a married woman, and therefore it was not her family, but the family of her husband. We think the court properly admitted this evidence, and that the family was properly described as being the family of Mary Riggs. Her husband had abandoned her—taken up with another woman, and had gone off—had left her five years before. She had her house and her children living with her; she provided for them. Now, beyond doubt, this was a family. Now who was its head? The evidence showed that Mary Riggs had her children residing and being with her in the house, around which the disturbance was made; that she had provided and acted as the head of the family since the desertion and absence of her husband. Can there be a doubt, then, but she was the head of the family? We think not. She being the head of the family, it was properly described as her family, and the evidence was properly admitted. He who supervises, controls and manages the affairs about a house is the head of a family. A constable in the township where Mary Riggs lives, with an execution against her, would not have doubted for a moment that she was the head of a family. (Wade v. Jones, 20 Mo. 75, and authorities therein cited on this subject.) The judgment below must be affirmed; Judge Leonard concurring.

THE STATE, Plaintiff in Error, v. ZWIFLE, Defendant in Error.

1. A criminal recognizance taken by a county court, as such, must be certified under the seal of the court. If taken by the judges, as magistrates, it must be certified by them, and not by the clerk of the court.

Error to Cooper Circuit Court.

Scire facias upon a recognizance. The defendants pleaded *nul tiel* record. At the hearing, the State offered to read in evidence a recognizance signed by the defendants, purporting to have been taken in the Cooper county court, conditioned for the appearance of one of them at the next term of the Circuit Court, to answer such indictment as might be preferred against him for burglary, and that he should not depart without leave.

The only certificate to the recognizance was one signed by the clerk, without the seal of the court. The Circuit Court excluded this evidence, and no other being offered, gave judgment for the defendants. The State brings the case here by writ of error.

Gardenhire, (attorney general,) for the State.

Adams, for defendants in error, referred to 4 Bouvier's Inst. 95, 96, 97; Todd & Means v. The State, 1 Mo. 566; 1 Bouvier's Inst. 342-3; R. C. 1845, p. 893. § 14, p. 862, § 36.

LEONARD, Judge, delivered the opinion of the court.

We had occasion, in the case of the State v. Randolph, (see p. 474) decided at the present term, to consider somewhat at large the doctrine in reference to criminal recognizances; and, referring to the opinion in that case, shall proceed at once to state the ground upon which we think the present judgment must be affirmed. We then remarked that, "at common law, the obligation (of a recognizance) was created by the mere verbal acknowledgment of the party, which the law entrusted the court

or officer with the duty of taking, and certifying to the proper court; but our statute (R. C. 1845, chap. 138, art. 9, § 14) has altered this, and, for the better security of the party against mistake or design, has required all recognizances, taken in open court, to be entered on the minutes of the court, and the substance to be read to the party; and in all other cases, when taken out of court, by any person authorized thereto, to be in writing, and signed by the persons to be bound. Of course, the party is bound as soon as the obligation is entered into in the form prescribed; but if it be taken by an officer, or by another court, it must be certified and filed in the court where the party is bound to appear, in order to render it complete and make it effectual." And then we held that, if it were imperfectly certified, the defect might be amended at any time before the objection was disposed of. The question here is, whether the recognizance was sufficiently certified to the Cooper Circuit Court, so as to entitle the state to execution upon it; and we think that it was not—whether it be considered as a recognizance taken in the Cooper county court, or as one taken by the judges of that court. In the first case, it should have been certified under the seal of that court, as that is the only mode in which a court of record can authenticate its acts; and the duty of the clerk (R. C. 1845, chap. 138, art. 2, § 36) was to transmit the recognizance, not to authenticate the act by his signature merely. Upon the other supposition, that it was the act of the individual judges, as magistrates, and not as a court, it should have been authenticated as such by their own certificate, and not by the certificate of another; so that, "*quacunqve via data*," the recognizance was insufficiently certified, and the judgment must therefore be affirmed.

Judge Ryland concurring, judgment affirmed.

THE STATE, Defendant in Error, v. LEVENS, Plaintiff in Error.

1. An indictment of a road overseer for failing to keep his road in repair, under the act concerning roads and highways, (R. C. 1845,) must state, in terms or in substance, that the failure was wilful.

Error to Morgan Circuit Court.

Indictment of a road overseer for not keeping his road in repair. The indictment charged that the defendant, "on, &c., in the county of Morgan aforesaid, was overseer of road district number fifteen, in said county, on the road leading from the first branch beyond Joshua Self's to the cross street in the town of Florence, duly appointed and notified thereof, and the said road district was then and there obstructed by trees and limbs of trees, which then and there incommoded horsemen and carriages, and there were then and there stumps therein, exceeding eight inches in height, and wet ground and small water courses not causewayed or bridged in such a manner as to enable horsemen and carriages to pass with safety; and so the jurors aforesaid, upon their oath aforesaid, do say, that said road district was not then and there kept in repair according to law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

F. P. Wright, for plaintiff in error.

Gardenhire, (attorney general,) for the State.

SCOTT, Judge, delivered the opinion of the court.

This was an indictment against the defendant as road overseer, for failing to keep the road district of which he was overseer in repair. The defendant was convicted, and made a motion in arrest of judgment, which being overruled, he sued out this writ of error.

This indictment is founded on the act for opening and repairing public roads and highways. (R. C. 1845, p. 960.)

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The 62d section of this act provides that, "if any road overseer shall *wilfully* fail or neglect to keep his road in good repair, &c., he shall forfeit and pay the sum of ten dollars."

The indictment does not charge that the overseer *wilfully* failed to keep his road in repair. Indictments must pursue the words of the statute on which they are founded. This is a well established principle in our code of criminal procedure.

Judge Ryland concurring, the judgment will be reversed; Judge Leonard absent.

RYLAND, Judge. The indictment is insufficient; it does not charge the offence in the words of the statute, nor in words of similar import, nor in words substantially of the same meaning.

THE STATE, TO USE OF SQUIRE & REED, Respondent, v. BIRD
& GILBERT, Appellants.

1. In an action against the sureties in a constable's bond, the judgment was, under the circumstances, reversed for the refusal of the court below, in the exercise of its discretion, to permit the defendants, after a motion to dismiss overruled and before judgment by default, to file their answer setting up lapse of time as a bar.
2. Where a statute creates an absolute bar by the mere lapse of time, without any exception, the defence may be made by demurrer, if the necessary facts appear in the petition.
3. The admissions of a constable, forming no part of the *res gesta*, are not evidence against his securities.

Appeal from Weston Court of Common Pleas.

This was an action begun September 15, 1854, against Stevens and his securities, upon his official bond as constable. It appeared from the petition that the bond was dated August 7, 1851; that it recited the appointment of Stevens as constable in the place of one Patton, removed, and was conditioned in the usual form of a constable's bond. There was no allega-

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tion as to the time when Stevens' term of office expired. The breach assigned was, that the constable had received from the beneficial plaintiffs a note against one Davis for collection, had collected the money, and failed to pay the same over on demand.

The history of the proceedings up to the time of judgment against Bird & Gilbert, the securities, for want of an answer, is sufficiently stated in the opinion of the court. Upon the assessment of damages, the plaintiffs were allowed to prove an admission by Stevens to Doniphan, made during the pendency of a suit on the note against Davis, which Stevens had employed Doniphan to conduct, that he had collected the money; and to the admission of this evidence, the defendants, Bird & Gilbert, excepted. After final judgment against them, they appealed to this court.

H. M. Vories, for appellant. 1. The petition was insufficient. The law positively declares that no suit shall be brought against the securities of a constable on his official bond, unless the same is brought within two years after the expiration of his term of office. (R. C. 1845.) In this case, it appeared on the face of the petition that more than two years had elapsed after the expiration of the term for which Stevens was appointed constable, as the court is bound to know the law which fixes the term for which constables are elected. 2. The defendants should have been permitted to file their answer after the motion to dismiss was overruled. The plaintiff had waived his right to object to the time within which the motion was filed, by consenting to a continuance. 3. The admissions of Stevens to Doniphan were not admissible evidence against the defendants, Bird & Gilbert. (2 Phill. on Ev. 669, 671, 673; Hotchkiss v. Lyon, 2 Blackf. Rep.; 3 Har. & McH. 242; 5 Esp. 26; 3 Bouvier's Inst. 364; Starkie's Ev. tit. Admissions; 1 Greenl. Ev. § 187, 188.)

Abell & Stringfellow, for respondent. 1. The motion to dismiss was properly overruled, both because it was filed too late, and because the statute of limitations can only be taken

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advantage of by answer. 3. The court will not interfere with the discretion exercised by the court below in refusing to permit the answer to be filed, as it can not see the reasons which operated on the mind of the court. The statute of limitations is an iniquitous defence, and is not favored. 3. The admissions made by Stevens, while he had the management of the suit for the collection of the money, were a part of the *res gestæ*, and were admissible.

LEONARD, Judge, delivered the opinion of the court.

At the return term no proceedings were had, except a single entry, postponing the case to another day. At the next term, the defendants filed a motion to dismiss, because it appeared upon the petition that the suit was commenced more than two years after the expiration of the constable's term of service, and the motion and suit were, by agreement of the parties, both postponed until the next term—the plaintiff, at the same time, taking an order for an alias writ against the constable, who had not yet been served. At the succeeding term, the motion to dismiss was overruled, and the sureties, no default having been taken against them, immediately presented an answer setting up the same defence, and asked leave to file it, which was denied, and judgment, for want of an answer, given against them. The plaintiff then discontinued as to the constable, who had been served with process since the last term, and the court proceeded at once to assess the plaintiff's damages.

The judgment will be reversed because the defendants were not allowed to make their defence. In matters of discretion, and this was certainly of that character, we do not interfere, except it appear clearly to us that the court has erred in the exercise of it, to the manifest injury of the complaining party, and such, we, think, was the case here. The purposes of justice will be best subserved by allowing a party to file his answer at any time before his default has been acted upon, in all cases when he has a real defence to make, and it will not create

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delay in the determination of the cause, or prejudice the just rights of the plaintiff, and there is no reason to believe that the failure to answer was wilful, or for any improper purpose. And it seems to us that every thing concurred here to require the court to allow the answer to be filed. Indeed, no ground has been suggested, nor does any occur to us why it should not have been done. We remark, without however expressly deciding the matter, that the statute ("Constables," section 6) upon which the defendants rely, seems to create an absolute bar by the mere lapse of two years, without any exception; and the rule of law, in such cases is, that the defence may be made by demurrer, if the necessary facts appear upon the pleading. (*Fellow v. Lee*, 2 Barb., S. C., 490; *Humbert v. Trinity Church*, 7 Paige, 195; and *Hook v. Whitlock*, Id. 373, and cases there cited.)

It is very true there was no reason or authority for substituting a motion in lieu of a demurrer, and the defendants' motion was clearly an improper mode of making their defence, even if the necessary facts appeared upon the petition. The difference, however, between the two is more formal than substantial; it was manifestly a mere slip here, in the party, as to the proper mode of presenting the defence; it was not excepted to at the time by the plaintiffs, but was rather acquiesced in by them, and no delay would have resulted from allowing it to have been made by answer.

We do not feel ourselves at liberty to denounce the defence as unconscionable—entitled to no indulgence—and available only to a party keeping himself strictly within the rules of law. These defendants were not endeavoring to avoid the payment of their own debt by the mere lapse of time, but were defending themselves against the heavy penalties inflicted upon them, as the constable's sureties, for an alleged breach of his duty, by insisting upon the plaintiff's omission to institute their suit within the time allowed by statute, under which the plaintiffs themselves claim the penalty. When they entered into this bond, it might very well have been their understanding, if not part of

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their contract created by the law, that they should continue liable during two years from the expiration of the term of service, and no longer, unless called to account within that time, and they might have willingly entered into such an undertaking, when they would have at once refused to become responsible for an indefinite period of time. But we need pursue the subject no farther, except to observe that, by the statute, the constable is to continue in office until his successor is elected and qualified, and not for two years only; and so it does not certainly appear from the petition at what time the constable's term of service expired, and that had this been otherwise, the defendants would have had the benefit of their objections to the petition here upon the overruling of their motion.

The other points in the case need not be decided; but it may not be improper to remark that the constable's admission, made to Doniphan, was clearly inadmissible against them; this conversation was no part of the *res gestæ*—the collection of the money, which was the official act of the officer, for which the plaintiff sought to recover against his securities, but was merely a narration of that affair—certainly, good evidence against himself, as his own admission of what he had transacted, but not against others, although they were bound for him in reference to the act to which the conversation related. (Greenl. Ev. § 187.)

Judge Ryland concurring, the judgment is reversed, and the cause remanded.

THE STATE, Plaintiff in Error, v. RANDOLPH, Defendant in Error.

1. As to the essentials of a criminal recognizance.
2. Where a recognizance is improperly certified, the defect may be amended at any time before the objection is disposed of, on such terms as will protect the party from being prejudiced by it.
3. It is not essential to the validity of a recognizance taken by a justice, conditioned that a party shall appear in court "to answer an indictment, and

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not depart without leave," that it should describe the offence with which the party is charged, or state the facts which gave the justice jurisdiction; nor need these facts be stated in the writ of *scire facias*. It is sufficient that they appear on the files and entries of the court.

4. A demurrer to a *scire facias* upon a forfeited recognizance, is not to be regarded as taken to what appears in the writ or in the recognizance, but to what appears of record.
5. A proceeding by *scire facias* upon a forfeited recognizance, is not a civil action within the meaning of the practice act of 1849, but a mere continuation of an existing proceeding.

Error to Callaway Circuit Court.

Scire facias upon a forfeited recognizance. The recognizance was filed in the office of the clerk of the Circuit Court on the 9th of October, 1854, and was as follows :

"State of Missouri—county of Callaway. Be it remembered, that, on the 15th day of September, A. D. 1854, Robert D. Randolph and Robert Randolph, sr., of Callaway county, personally came before me, a justice of the peace within and for said county, and acknowledged themselves to owe to the state of Missouri, that is to say, Robert D. Randolph, the sum of two hundred and fifty dollars, and the said Robert Randolph, sr., the sum of two hundred and fifty dollars, to be levied of their goods and chattels, lands and tenements, if the said Robt. D. Randolph shall fail in the condition underwritten. The condition of this recognizance is such, that if the above bounden Robert D. Randolph shall personally appear at the Circuit Court, on the first day of the next term thereof, to be holden for the county of Callaway on the 9th day of October next, then and there to answer an indictment to be preferred to the grand jury against the said Robert D. Randolph for assault, beat and cut, on purpose, of malice aforethought, whereof he stands charged, and shall not depart the same without leave of the said court, then this recognizance to be void; else to remain in full force.

"ROBERT D. RANDOLPH, (seal.)

"ROBERT RANDOLPH, (seal.)

"Taken and certified the day and year last aforesaid.

"ZADOCK HOOK, J. P., (seal.)"

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On the same day, there was filed in the office of the clerk the justice's transcript, as follows :

"State of Missouri v. R. D. Randolph. Assault; upon affidavit of H. B. Renor. Warrant issued in this cause 13th day of September, 1854, and returnable forthwith, and delivered to W. T. Snell, sheriff Callaway county.

"W. B. TUCKER, J. P.

"This cause came on to be heard on the 15th day of September, 1854, the defendant being here in court. Both the parties being ready for trial, and the witnesses in this cause having been duly examined, and their examination having been duly committed to writing, and after due deliberation and consideration by the justice, it is ordered and adjudged that this cause be certified to the Circuit Court of Callaway county, and that the said defendant enter into a recognizance to appear before the judge of our said Circuit Court on the second Monday in the month of October next, in the sum of two hundred and fifty dollars for himself and two hundred and fifty dollars for his security, and thereupon said defendant entered into said bond, with Robert Randolph, sr., as his security, as directed by law."

To this transcript was annexed the certificate of W. B. Tucker, the justice.

On the 12th of October, 1854, a forfeiture of the recognizance was entered in the Circuit Court, and on the 19th of December, a *scire facias* issued upon it, which, after reciting that it was taken "before William B. Tucker, otherwise Zadock Hook, justices of the peace within and for Callaway county," and its condition, and the forfeiture, commanded the sheriff to make known to the said Robert D. Randolph and Robert Randolph, sr., that they appear at the next term of the court to show cause why execution should not issue for the penalty.

At the next term, the defendants appeared by attorney, and filed a demurrer, pending which, on motion of the circuit attorney, the suit was dismissed as to Robert D. Randolph, and W. B. Tucker, the justice, was permitted to add to the recog-

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nizance, *nunc pro tunc*, the following certificate : "Taken and certified before me on the 15th day of September, 1854.

"W. B. TUCKER, J. P."

Afterwards, upon a hearing, the demurrer was sustained, and the case is brought here by writ of error.

Gardenhire, (attorney general,) submitted the case for the State without brief or argument.

H. C. Hayden, *J. W. Morrow* and *C. H. Hardin*, for defendant in error, in their brief argued the following points : 1. The recognizance is invalid because it does not appear upon its face that the principal recognizor was charged with any crime or misdemeanor for which the justice was authorized to hold him to bail. It is essential to the validity of a recognizance that a crime, *in substance*, should be charged. (3 J. J. Marsh. 642, 643 ; 1 Dana, 523, 165 ; 2 Kelly, Georgia, 363 ; 2 Black. Comm. 341 ; 33 Maine, 536 ; 18 Ala. 293 ; 2 Carter, Ind., 371 ; 10 Barb. 35 ; 13 Ills. 696 ; 7 Hill, 39 ; 17 Wend. 252 ; 9 Mass. 520 ; 16 id. 447 ; 4 id. 641 ; 7 id. 209 ; R. C. 1845, p. 861, § 26.) 2. There is a material variance between the *scire facias* and the recognizance. The recognizance appears to have been taken and certified by Zadock Hook, and that set out in the *sci. fa.* is one taken and certified by "Zadock Hook, otherwise W. B. Tucker, justices of the peace." The amendment allowed by the Circuit Court was a nullity, or, if proper, could only operate to give the Circuit Court jurisdiction from the time it was made, and could not cut back so as to give validity to the prior proceedings, and detain the defendants in court to answer another recognizance and a different cause of action. Even if the amendment was properly allowed, still there is a variance. 3. There is no averment in the *scire facias* that the recognizance was certified and returned to the Circuit Court. (1 Dana, 523 ; R. C. 1845, § 29, p. 861.) 4. This being a civil proceeding, instituted by the State to recover a debt of record, a *scire facias* was not the proper remedy, as it is not embraced among the exceptions in the 6th

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section of article 30 of the code of practice of 1849. A *scire facias* upon a criminal recognizance is a common law proceeding, and not a statutory remedy. (12 Mass. 1; 1 Chitty's Pl. 111.) 5. The recognizance contains no words of covenant or obligation *on the part of the defendants*, and for that reason does not bind them. (R. C. 1845, p. 893, § 14.)

LEONARD, Judge, delivered the opinion of the court.

In order to simplify the questions raised here, and render the solution of them more easy, we will briefly refer to the nature of a recognizance, and the usual proceedings to enforce its execution, confining what we have to say to a recognizance taken in a criminal proceeding to secure the appearance of the accused. It is, as we all know, an acknowledgment, taken by some court or officer authorized by law to do so, of a debt due to the State, but suspended upon the condition that the accused appear in court at the appointed time, and answer the alleged charge, and do not depart without leave. The essentials of such a recognizance are, that it be taken by a competent court or officer, in a case existing before such authority, and for the performance of some act that the law allows to be secured in that way, and in the form prescribed for that purpose.

At common law the obligation was created by the mere verbal acknowledgment of the party, which the law entrusted the court or officer with the duty of taking and certifying; but our statute (R. C. 1845, chap. 138, art. 9, § 14, p. 893) has altered this, and, for the better security of the party against mistake or design, has required all recognizances that are taken in open court to be entered on the minutes of the court, and the substance to be read to the party; and in all other cases, when taken out of court, to be in writing and signed by the persons to be bound. Of course, the party is bound as soon as the obligation is entered into in the form prescribed; but if it be taken by an officer or in another court, it must be certified and

filed in the court, where the party is bound to appear, in order to render it complete and make it effectual. But, in such case, if it be imperfectly certified, the defect may be amended—*nunc pro tunc*—at any time before the objection is disposed of; and this, like all other amendments, is allowed only upon such terms as will protect the other party from being prejudiced by it.

Although a recognizance can only be taken to secure the performance of some act that the law allows to be secured in that way, we do not deem it essential to the validity of the recognizance, that it should specify upon its face the specific charge that the party is to answer to. It is impossible to reconcile the American cases upon this subject, and we shall not attempt it, as we think the matter is plain enough.

The meaning of a recognizance is, that the party shall not only appear and answer the particular charge, but also, in the language of Hawkins, (Pl. Cr. b. 2, chap. 15, § 84,) “put himself as much under the power of the court as if he had been in the custody of the proper officer;” and in the same book, it is laid down, “If persons be bound by a recognizance that J. S. shall appear in the K. B., in such a term, to answer such an information against him, *and not depart till he shall be discharged by the court*, and afterwards the attorney general enter a *nolle prosequi* as to that information, and exhibit another upon which the defendant is convicted, and he refuses to appear in court after personal notice, the recognizance is forfeited. For, being express that the party shall not depart till he be discharged by the court, it can not be satisfied unless he be forthcoming and ready to answer any other information exhibited against him while he continued undischarged.” In the *People v. Stager*, (10 Wend. 431,) it was said that the clause “that he shall not depart until discharged,” is not necessary to be inserted in the recognizance, in respect to the charge upon which the recognizance is entered into; that its use is to detain the party upon other charges that may be exhibited against

him. In *Champlain v. The People*, (2 Comst. 81,) it was held to be no answer to a recognizance conditioned to appear "and answer to an indictment to be found and not depart without leave," that no indictment was found, on the ground that the accused was not entitled to his discharge as a matter of course.

We believe it will be found upon examination, that the precedents of recognizances are quite as common in the general form, to answer "to an indictment to be found," without any specification of the particular offence, as in the other form, specifying the particular charge.

And we do not think our legislature intended by the clause to which we have been referred, (R. C. 1845, chap. 138, art. 2, § 26,) to make any change in the law in this respect, as indeed no reason can be suggested for doing so. Now, if we strike out of this recognizance the words in which the justice has attempted to describe the particular charge, it is a recognizance to answer generally to any indictment that may be preferred against the party; just what it would have been, in substance, had the particular offence been described with technical exactness; on account of the insertion in it of the clause "not to depart," &c. The recognizance therefore can not be void for the alleged defect, even if the language describing the particular charge be wholly unintelligible, which, by the way, is not the case, although it is certainly a very informal description of a felonious assault.

A justice of the peace has jurisdiction to commit and recognize for all offences committed in his county, cognizable in the Circuit Court, and of course the justice here was a competent officer to take a recognizance from this defendant for his appearance in the Circuit Court to answer to an indictment to be there preferred against him. And, although there must have been a case pending before him, in order to give validity to the recognizance he took, yet the particular facts by which he acquired jurisdiction to take the recognizance need not and usually

do not appear upon the recognizance itself. In New York, where it is usual to file a declaration in a proceeding by *scire facias* upon a recognizance, it was held in the People against Kane, (4 Denio, 531,) that, in such a declaration, it was not necessary to aver the special facts by which the officer became authorized to take the recognizance in the particular case, overruling two previous cases in the same court upon that subject. Bronson, C. J., in delivering the opinion of the court, remarked: "When the recognizance has a condition to do some act, for the doing of which such an obligation may be properly taken, and the officer before whom it was acknowledged had authority by law, in cases of that general description, I think the recognizance is valid, although it does not recite the special circumstances under which it was taken. And in declaring upon such a recognizance, I do not think it necessary to aver the existence of the particular facts which prove that the officer had authority to take it. It is undoubtedly a well settled and highly important principle, that, before any one can be affected by the judgment or order of a court or officer, of special and limited jurisdiction, it must not only appear that the court or officer had authority to act in cases of that kind, but that jurisdiction had been acquired in the particular case. But there is an obvious distinction between cases where a charge or burden is attempted to be fastened upon a party by a proceeding *in invitum*, and those where the charge or burden springs from his own voluntary act." In our practice, no record of the recognizance is drawn up in form, stating the whole proceeding, nor is any declaration filed, or indeed necessary, as the facts that entitle the State to an award of execution can not appear otherwise than from the entries and files of the court; and, according to our mode of proceeding, which is very informal, the demurrer in this case must be considered as taken not to the writ, which does not perform here the double office of writ and pleading, as it does in those cases, where some extrinsic fact is necessary in order to make out the party's case, but to what ap-

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pears of record, or rather to what appears on the files and entries of the court from which the formal record would, if required, be drawn up. And here it thus appeared that there was an affidavit, a warrant, an apprehension of the party, an examination and an adjudication that he give bail for his appearance, and of course it thus sufficiently appeared how the officer acquired jurisdiction in the particular case; and the defendant's objection is thus reduced to the mere formal one, that it did not appear upon the face of the recognizance, or upon the writ of *scire facias*, neither of which was necessary according to the New York cases, or under our peculiar practice.

In reference to the proceeding upon the recognizance, a few remarks will be sufficient to answer the objections that have been taken. The recognizance, after the forfeiture, being equivalent to a judgment against the party for the amount confessed, the State may proceed to collect it upon execution; and in England, in criminal recognizances, where there was no doubt as to the forfeiture, this seems to have been done without any *scire facias*, as was at one time the practice in New York, or the State may bring a fresh suit upon it; and if the latter course were taken, it might then be insisted that the State should sue in the form prescribed to other persons. The present proceeding however, is not a civil action within the meaning of the new code, but a mere continuation of an existing proceeding, to enforce the collection of the debt confessed.

In England, as soon as the recognizance is forfeited, it is *estreated* into the court of exchequer for collection, and we briefly refer to the proceedings there to show the nature and character of a *scire facias*, whether taken in criminal proceedings or for other purposes. An extent is a writ of execution against the body, goods and lands of the debtor, and when used by the crown, is an ancient prerogative writ for obtaining satisfaction of debts due to the king; and upon a recognizance of any kind to the king, if it be clearly forfeited, as usually sufficiently appeared when the condition was for the appearance of

the accused, an extent issued in the first instance, *without any scire facias* (2 Tidd Prac. 1090); but if it were doubtful whether or not there had been a forfeiture, a *scire facias* was necessary. (2 Tidd. 1140.) This being a judicial writ, founded upon some matter of record, issues out of the court where the record is, and although, where it discloses extrinsic facts and requires an answer from the defendant, it is in the nature of a declaration, yet, when the object is to obtain execution upon what appears of record, it is properly called a writ of execution (2 Tidd. 1139); but because even then it may be pleaded to, it is so far considered in law as an action. (2 Tidd. 1139.) When sued out upon a recognizance, it recites the recognizance, and commands the sheriff to warn the defendant to appear and show cause why the king should not have execution of the sum acknowledged to be due. If the sheriff warn the defendant, he returns the writ accordingly; otherwise he returns "*nihil*;" and in the latter case a second *scire facias* issues, and on the return of either "served" or of two "*nihilis*," a rule is entered requiring the party to appear and plead. If he appear, a *declaration is filed* and the defendant may then move to set aside the proceedings for irregularity, or may plead in abatement or in bar, as in other actions. (2 Tidd. 1142.) Such is the English practice. Ours, it is seen, is somewhat different. The practice in some, if not in all the northern states, following the English practice, is to file a declaration; but in Virginia, and other southern states, this is never done; (Robinson's Pract. 584; Brown v. Harley, 2 Florida, 162); and we have adopted the latter practice. Here no fact, as we have before remarked, need be shown by the State, except what appears upon the entries and files of the court, and upon the demurrer, therefore, we think reference may be had to them; and if sufficient appear upon them to entitle the State to an award of execution, the demurrer ought to be overruled, without any reference to the omissions in the writ.

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We are not advised as to the particular ground upon which the demurrer was sustained; certainly, both the recognizance and the *scire facias* are somewhat informally drawn up; but we think both are sufficient in substance, and that there was enough upon the files and entries of the court to entitle the State to judgment upon the demurrer. The result is, the judgment must be reversed, and the cause remanded for further proceedings. Judgment reversed, and cause remanded.

[END OF JANUARY TERM.]

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

MARCH TERM, 1856, AT ST. LOUIS.

PHILLIPS, Respondent, v. HUNTER, Appellant.

1. A. transferred to B. a negro slave, and gave a bill of sale absolute on its face, but intended merely as a security for indebtedness of A. in favor of B.; the slave, although delivered to B. at the date of the bill of sale, and retained by him for a few days, was permitted to remain in possession of A. until his death shortly after; A.'s administrator, upon the production by B. of the absolute bill of sale, thinking B. justly entitled to the slave, received from him a sum of money alleged to be the balance of the purchase money due A.'s estate, and gave a receipt for the same and surrendered the slave to B. *Held*, that this transaction did not amount to a sale of the slave by the administrator to B., nor did it cut off the equity of redemption belonging to A.'s estate.
2. A sale by an administrator, under an order of the county court, of an equity of redemption in a slave, is valid, although the slave is in the possession of the mortgagee, who claims to hold absolutely, and refuses to deliver up the slave.

Appeal from New Madrid Circuit Court.

This was a suit, instituted August 9th, 1853, to redeem a slave, alleged by plaintiff to be held by defendant as mortgagee. The facts are as follows: One Winchester, owning a

negro boy named Frank, and being indebted to Hunter, the appellant, in the sum of \$261, executed, January 28th, 1851, the following bill of sale: "For and in consideration of the sum of five hundred dollars to me in hand this day paid, the receipt whereof is hereby acknowledged, I have sold unto Wm. W. Hunter, and delivered up to him, a certain negro boy named Frank, aged about sixteen years, sound in body and mind, and a slave for life. The title of said boy I bind myself, my heirs, &c., to warrant and defend unto the said Hunter, his heirs, &c., against the claim or claims of all persons. In testimony whereof, I have hereunto set my hand this 28th day of January, 1851. [Signed] Isaac Winchester."

The following agreement, signed by the said Hunter and Winchester, was, at the same time, executed and delivered to Winchester: "I, having this day purchased of Isaac Winchester a certain negro boy, named Frank, for the sum of five hundred dollars, as stated in bill sale this day given me of said boy, do, by this writing, obligate myself, and agree with said Winchester, that if he does pay to me, on or before the twenty-fifth day of December next, the sum of two hundred and sixty-one dollars, with interest thereon from this date, and any other just demand I may have against him at that time, (viz., December 25, 1851,) that I will deliver up said boy to him (should he be alive) and make him a title to said boy Frank; he, the said Isaac Winchester, agreeing that in case said negro boy Frank does not live until the 25th day of December, 1851, that he will pay the amount specified above, (two hundred and sixty-one dollars,) with interest thereon from this date until paid. In testimony whereof, we have set our hands, 28th January, 1851. [Signed] W. W. Hunter, Isaac Winchester."

At the time of the execution of these writings, Winchester delivered said negro Frank to Hunter, who retained possession of him for several days, and then permitted him to return to the possession of said Winchester. Winchester died in possession of said negro Frank. One Adam Magee was appointed administrator of the estate of said Winchester, and he, thinking at the

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time that Hunter was justly entitled to the boy Frank, received from said Hunter, December 27th, 1851, the sum of \$224 20, which was stated by Hunter to be the balance due Winchester on the price of the negro, and thereupon transferred said slave to Hunter, and gave him the following receipt: "Received of William W. Hunter two hundred and twenty-four dollars and twenty cents, being the full balance due Isaac Winchester, deceased, by said Hunter, on a negro boy, named Frank, sold to said Hunter by said Isaac Winchester, during his life-time, for the sum of five hundred dollars, and transferred by said Winchester on the 28th day of January, 1851, to said Hunter. New Madrid, Mo., December 28th, 1851. [Signed] Adam Magee, administrator of Isaac Winchester, deceased."

Afterwards, under an order of the county court of New Madrid county, Magee sold to the plaintiff, Presley Phillips, for the consideration of \$277, all the interest of the estate of said Winchester in the negro boy Frank. This sale was made for the payment of the debts due from the estate of said Winchester. The boy Frank was not present at this sale to Phillips, but was in possession of defendant, Hunter.

The court found that the two instruments of writing, above set forth, dated January 28th, 1851, constituted a mortgage of the negro boy Frank to the defendant, Hunter.

Phillips, after tendering to Hunter, the defendant, the amount due him, after deducting the value of the services of the said negro Frank while in possession of the defendant, and upon the refusal of defendant to deliver up said negro to plaintiff, brought the present suit for his redemption.

The cause was tried by the court, and judgment was given for plaintiff. Defendant appealed.

Glover & Richardson, for appellant. 1. The sale by the administrator to the plaintiff was void. To constitute a sale, an actual or constructive delivery is necessary. There is no pretence that in this case there was an actual delivery to the respondent, neither was there a constructive delivery, for the slave, at the time of the sale by the administrator of the equity

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of redemption, was in the adverse possession of the appellant. 2. The administrator had no interest in the slave at the time of his sale to the respondent, and therefore could pass no title. According to the finding of the court, Winchester had the right of redemption provided he paid to the appellant a certain sum of money by a given day ; but having failed to pay it, the title to the slave vested absolutely in the mortgagee, and Winchester's right of redemption was forfeited. 3. On the 28th December, 1851, the administrator received of Hunter \$224 20, the balance of the consideration for the purchase of the slave, and delivered him the slave as his property. The slave was a chattel, and if the administrator had the right to sell him, he had the right without an order of the county court, and his sale would carry all the interest of the estate in him. The transaction between the administrator and Hunter on the 28th December, 1851, operated as a sale ; the money was paid and received as the balance due from Hunter for the purchase money and divested all the interest of the estate, so that nothing remained to be sold, and nothing was acquired by the respondent's purchase. The court does not find that there was any fraud in the payment of the money by Hunter or in getting possession of the slave, and the transaction, therefore, is to be treated as perfectly fair ; and if the sale was within the scope of the powers of the administrator, it was effectual to pass the title. Whether the administrator acted wisely and sold for too little, is not the question, and the only question is one of power. 4. In this case, the administrator did not assign to the plaintiff a cause of action, but sought to sell a specific interest.

T. Polk, for respondent. 1. The motion for a review filed by appellant, defendant below, does not make a case containing any of the evidence ; consequently there could be no review upon the evidence, either of questions of law or of fact, and the court below committed no error in overruling said motion. (Code of Practice, art. 16, § 3 ; *Skinner v. Ellington*, 15 Mo. 488 ; *Raymond v. Edgar et al.*, 19 Mo. 32.) 2. This court will not reverse the judgment of the court below for the reason

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that the finding of the court below is not supported by the evidence. That is a matter left by this court to the lower court. And if that court refuses to set aside the verdict of a jury, or its own finding, on the ground of its not being warranted by the evidence, this court will not reverse its own judgment because of such refusal. (*Skinner v. Ellington*, 15 Mo. 488.) 3. The facts found by the court warrant the conclusions of law to which it came. And such being the case, this court will not reverse the judgment of the court below as this case is presented on the record. 4. Under the facts of this case, Winchester had a right to redeem the slave Frank. (*Williams v. Rower*, 7 Mo. 556.) It matters not that the time fixed for paying the debt for which the slave had been pledged by W. to appellant, had passed before the sale of the right of Winchester's estate in the same was made. Because, what the statute authorized to be sold, and what, in fact, was actually sold by the administrator, was the equity of redemption in the slave. And an equity of redemption in personalty as well as in reality, is the right of the mortgagor to redeem the estate or property when forfeited at law. (*Jickling's Analogy*.) 5. The county court of New Madrid county had authority to order the right of Winchester to redeem the slave, to be sold at public auction. (See Code 1845, art. 3, § 6 and 7, p. 83, 84.) 6. But the question whether respondent was clothed with all the rights to the slave that had belonged to Winchester in his life-time, was in no manner raised, as I contend, on the trial of the cause below, and this court ought not to entertain it. This court will pass only on the questions that were made in the court below. (*Gordon v. Gordon*, 15 Mo. 215; *Long v. Story*, ib. 4; *Chamberlain v. Smith*, 1 Mo. 718.)

LEONARD, Judge, delivered the opinion of the court.

This judgment must be affirmed. Assuming that there was a proper application to the court below for a review of the finding, upon the ground that it was not warranted by the evidence,

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and that a case has been properly made to subject the decision of the inferior court upon that motion to review here, there is nothing in this part of the case to justify a reversal of the judgment. If we look into the evidence we can not say that the finding was against it, and we may therefore pass at once to the question whether the facts found warrant the judgment the court pronounced upon them.

The original transaction is not only expressly found to have been a mortgage, but is shown to have been such by the specific facts found, and the act of the administrator, in receiving from Hunter the balance of the alleged purchase money, and surrendering the possession of the slave, was neither a new transaction, then passing the title to Hunter, nor a sale to him of the equity of redemption. The administrator acted upon the representations of Hunter, who insisted that the title had already passed to him, and that there was no equity of redemption in the administrator—the original transaction being, in his view of the matter, a sale, with the privilege of repurchasing, and not a mortgage. This transaction was not put in the form of a transfer of the original title of the sale of the equity of redemption, and of course we ought not to allow it to operate in that way, when the effect would be to defeat the intention of the parties.

The sale made by the administrator, under the order of the county court, was valid, and transferred the equity of redemption, and the non-delivery is no ground of nullity in that transaction. The judgment is affirmed.

GRIDER, Respondent, v. DENT, Appellant.

1. In a suit by a father for the seduction of his daughter, the defendant will not be permitted to prove that the plaintiff had cast imputations upon the virtue of his own mother by giving evidence in a former judicial proceeding that she had had an illegitimate child before her marriage with plaintiff's father.

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Appeal from St. François Circuit Court.

This was an action brought by Thomas Grider against Cyrus Dent, to recover compensation for the seduction by defendant of Susan Grider, daughter of plaintiff. There was a verdict for plaintiff, and the damages were assessed at the sum of \$2000, and judgment given for that sum.

During the progress of the trial, the defendant offered to prove that the plaintiff, Thomas Grider, in defence of a petition for a partition of the slaves and real estate belonging to the estate of Christopher Grider, deceased, (father of plaintiff in this suit,) had offered testimony to prove that Polly Cartee, one of the petitioners in the partition suit, was not a daughter of Christopher Grider, deceased, but an illegitimate daughter of the wife of said Christopher, (the mother of Thomas Grider, plaintiff,) born before her marriage with the said Christopher, and before her acquaintance with him. The court refused to permit such testimony to be given to the jury; and one of the errors assigned is this refusal; another is, that the damages are excessive.

Frissell, for appellant. 1. The action is founded upon the pretence that the father has lost the services of his daughter in consequence of the wrongful act of the seducer; but the gist of the action is the disgrace and anguish the father and family are supposed to suffer on account of the act of his child and her seducer. If the father is not disgraced, if his precedent acts show that he has suffered little or no anguish on account of the subject of the suit, why may not his actions, which show the estimation he holds the reputation of his own mother for virtue, be given in evidence in mitigation of damages? The evidence offered and excluded would, at all events, tend to prove that, for the sake of excluding one of the heirs of his father's estate from her distributive share, he was willing to bring up a transaction half a century old, to the disgrace of the memory of his mother, and which was unknown or forgotten by the present generation. After such an act on his part, he could hardly be

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supposed to have been disgraced by the false step of his daughter, nor could he reasonably be supposed to suffer much anguish of mind. (See 2 Greenl. Ev. 476.)

D. E. Perryman, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The only question here is, as to the ruling of the court below in refusing to permit the defendant to prove that the plaintiff had previously, in a judicial proceeding, given evidence that his own mother had given birth to a child before her marriage. The Circuit Court would not permit the proof to be given by defendant, and he brings the case here upon this point; for there is nothing else in the record calling for our attention.

We are inclined to the opinion that this evidence was properly rejected. We can not assent to the proposition that proof of any one act by the parent, totally disconnected with the matter before the jury, however indicative it may be of want of proper moral and natural feeling, can lawfully be given to the jury. This evidence was not in relation to the daughter, nor the character or conduct of the daughter. It bore no relation towards the father's conduct in respect to his daughter; it was totally foreign to the matter in controversy. True, it did have a tendency to show the father devoid of natural feelings, of filial affection—and to convict him of a revolting disregard of the reputation of his own mother, of his own brothers and sisters. But, though the father may have acted like a man void of natural sensibility in one transaction, yet there may be those in his family keenly alive to the best and kindest impulses of our nature and upon whom the blow may have fallen with crushing weight. No; as it would not have been competent for the father to show how much he did feel for his child—how much he suffered—what were the miseries of his own dwelling, in order to increase the damages, it should not be proved against him that once upon a time he showed a want of heart.

The case of *Dodd v. Morris*, (3 Camp. 519,) does not support the doctrine contended for by Greenleaf in his work on the

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law of evidence. (2 vol. p. 476, § 579.) Lord Ellenborough would not suffer the plaintiff's counsel to introduce evidence as to the character of the plaintiff's daughter, who had been seduced. He observed that "the law considered this an action of trespass for assaulting the daughter, whereby the parent lost her service; and, although by some anomaly, when the loss of service was established, a further compensation was allowed for the injury to the parental feelings, it was necessary to watch that this anomaly should not be carried farther, and that the original scope of the action should not be entirely lost sight of." There is nothing about "proof of profligate principles and dissolute habits of plaintiff himself" in the whole case. In *Magrath, widow, v. Browne*, (*Armstrong, McCartney & Ogle's Rep.* 134,) Brady, C. B., suffered the question, "Have you had an opportunity of observing the conduct of the plaintiff and her daughter, and if so, have you ever known them to be guilty of any impropriety of conduct?" to be put to a witness, a lady with whom the plaintiff and her daughter had lodged, and to be answered by the witness, after serious objection and argument. Here, the question was to elicit testimony in relation to matters bearing on the subject before the jury—not character, but conduct, and conduct, too, kindred to the matters before the jury.

Upon the best reflection bestowed upon this case in our power, we come to the conclusion that the evidence below was properly rejected. Let the judgment be affirmed, with the concurrence of Judge Leonard.

WILCOX, Appellant, v. DANIELS & STRICKLAND, Respondents.

1. A voluntary dismissal of an appeal by the defendant in an action of forcible entry and detainer, is a breach of the condition of a recognizance to prosecute the appeal with effect and without delay, and the party aggrieved may have relief in an ordinary action on the recognizance.

Appeal from Jefferson Circuit Court.

This was an action on a recognizance of appeal, executed by Daniels as principal, and Strickland as security, on appeal from the judgment of a justice of the peace in an action of forcible entry and detainer, wherein Wilcox, appellant here, was plaintiff, and Daniels, respondent here, was defendant. In this action of forcible entry and detainer, judgment was given for the plaintiff, Wilcox; and the defendant, Daniels, appealed to the Circuit Court, and filed a recognizance, with Strickland as security, conditioned that he would "prosecute his appeal with effect and without delay, neither commit, nor suffer to be committed, any waste or damage on the premises whereof restitution was adjudged, and pay all rents and profits, damages and costs, that might be adjudged against him, and otherwise abide the judgment of the Circuit Court."

On this recognizance the present suit is brought, and the breaches assigned are, that Wilcox did not prosecute his appeal with effect and without delay, but voluntarily dismissed the same without so prosecuting it; that defendant did not pay to plaintiff the rents and profits and damages justly due him. Plaintiff set forth in his petition that, in consequence of the appeal, he was unable to get possession of the premises in controversy until some time in the latter part of June, 1854, too late to raise a crop of corn upon the same during that year.

The recognizance was set forth in the petition. The defendants demurred to the petition, and the demurrer was sustained and judgment given thereon for the defendant.

Green and Chas. Jones, for appellant.

Pipkin, for respondents.

SCOTT, Judge, delivered the opinion of the court.

The question raised by this record is, whether an ordinary action will lie upon an appeal bond taken in a justice's court, in a forcible detainer, or whether the appellee is not confined exclusively to the judgment which may be rendered on the ap-

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peal in the court in which it may be tried, so that, if he fails to obtain an assessment of the damages he has sustained in that manner, he is remediless.

We are not aware of any principle which excludes the plaintiff from an ordinary action on the appeal bond. It is true he might have resisted the dismissal of the appeal and insisted on his right to have his damages assessed according to the condition of the appeal bond, in the court to which the appeal was taken. But we do not see that his failure to do this should entitle the defendant to the advantage, which he seeks to obtain by his defence to this action. The dismissal contemplated by the 30th and 31st sections of article 1 of the act concerning forcible entries and detainers, is such as is had at the instance of the appellee, and not that which is voluntary. The act of the defendant, in voluntarily dismissing his own appeal, clearly contravened the condition of his bond, that he would prosecute his appeal with effect. We see no difference in principle between this case and that of *Cockerill vs. Owen* (10 Mo. 287). With the concurrence of the other judges, the judgment is reversed, and the cause remanded.

RICHARDSON AND WIFE, Appellants, v. MEANS, Respondent.

1. Where a slave is conveyed to a trustee to be held in trust for the use of a married woman for life, (she being entitled by the deed of conveyance to the possession of the slave,) and upon her death for the use of the children; *held*, that the wife can not in her own name and that of her husband maintain an action for the conversion of the slave. An action for the protection of the legal ownership should be brought in the name of the trustee, or in case of his death or refusal to act, or the existence of any obstacle to the ordinary legal remedy, a proper case for equitable relief might be made and such relief furnished.

Appeal from Mississippi Circuit Court.

This was an action commenced June 17, 1853, by Maria L. Richardson (the husband having afterwards been made a party

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by an amended petition) for the recovery of a female slave and her two children, alleged in the petition to have been wrongfully taken by the defendant, May 1, 1849, and unlawfully detained by him.

Defendant, in his answer, denied the title of plaintiff, and claimed title in himself, and relied upon a bill of sale to himself, dated May 1, 1848, of the negress and one child, executed by Thomas R. Richardson, husband of plaintiff, Maria, and co-plaintiff in this action.

To sustain the wife's right, she relied on a deed of gift from her father, William C. Bruce, dated April 1, 1845, by which, in consideration of love and affection toward the plaintiff, his daughter, he conveyed the female slave in controversy to one Littleton Jozner, "upon trust that the said Jozner, his executors, &c., shall permit my said daughter to hold possession of and take the use, hire and profits of the said Maria and her increase to her sole and separate use during her life, independent of her said husband; and at the death of my said daughter, the said Maria and her increase to be equally divided between her children," &c.

The bill of sale mentioned above, dated May 1st, 1848, was introduced and proven by defendant.

It is unnecessary to set forth the instructions given to the jury, as the decision of the court rests upon grounds entirely unconnected with the instructions given.

The jury found for the defendant, and judgment was given accordingly. Plaintiffs appealed.

Cates, for appellants. 1. By the deed of trust, "the use and possession" of the slave vested in the wife during life, to the exclusion of the husband and Jozner, the trustee. The latter was a mere trustee, to support and maintain the remainder vested in the children; neither the husband nor trustee had the power to limit or control the action of the wife in the use and possession of the slave; she had the power to sell or dispose for the term of her life; in other words, she had a life estate, free and independent of all persons, and any violation of her estate


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was personal to her. Hence, she was the real party in interest, and, by the code, had a right of action for the wrongful conversion and detention. (See Code, art. 3, § 1 and 2; 18 Mo. 565; case of Rankin, 19 Mo. 493; 2 Kent. Com. 162.) The doctrine of the case of Gibbon (20 Mo. 468) is not opposed to the view here contended for. 2. It is a fixed principle of law that in all separate estates of the wife, created by trust deed, with or without the intervention of a trustee, the husband takes the legal estate, and is treated in equity as trustee for the separate benefit of the wife. (Hill on Trustees, 588, 609, and notes referred to.)

Glover & Richardson, for respondent. 1. No matter what errors may have been committed, the judgment is for the right party, and must stand. The plaintiff had no *status* in court, for the bill of sale from Bruce to Jozner put them out. 1. Jozner was living, he ought to have brought the suit: if he was dead, the plaintiff ought to have taken the proper steps for the appointment of another trustee. (*Gibbons v. Gentry*, 20 Mo. 468; *Gobin v. Huntington*, 15 Mo. 40.)

LEONARD, Judge, delivered the opinion of the court.


We can not reverse this judgment, no matter how much we may regret that parties, by a slip in the form of proceeding, should subject themselves to costs and delay in the judicial enforcement of their rights. The instructions given are correct in point of law, and this seems to be admitted; but the objection is, that the one given by the court upon its own suggestion, was not warranted by any evidence in the cause, and that, although correct in the abstract, it had the effect of misleading the jury. If this could be made apparent to us, it might furnish sufficient ground for reversing the judgment in a case where the reversal would avail the party. Here, however, the plaintiffs have stated themselves out of court, and therefore, if the jury were misled, it resulted in no injury to them; for the reason that, according to their own showing, they had no case entitling them to a recovery. The plaintiffs' title is derived



from the instrument of gift executed by the father, which vests the legal ownership in the trustee for the use of the wife during her life, and upon her death for the use of her children, and the action is to redress a wrong done to the legal ownership, being substantially an action for the conversion of the plaintiffs' slaves. Under the old form of proceeding, this suit must have been brought by the trustee at law ; but if, from any cause, the legal ownership could not have been made effectual for the protection of the wife's equitable right, the courts would, at her suit, upon a proper statement of facts, all the necessary parties being before them, have administered the appropriate equitable relief. But it is supposed that all this is changed by the new code, which is true to some extent. It must be observed, however, that the code has not changed the rights of parties, but only provided new remedies for their enforcement ; it has not abolished the distinction between equitable and legal rights, but the distinction between legal and equitable remedies, so far, at least, as to provide that one form of suit shall be used for the enforcement of both classes of rights. The case made upon the record was for legal relief ; but the case made by the plaintiffs, in proof, was of a different character.

It was the duty of the trustee to protect the legal ownership from violation, and to preserve the property for the use of the parties beneficially interested as they should respectively become entitled ; and if, as before remarked, there were any obstacles in the way of the legal remedy, or the trustee refused to do his duty, then, upon a proper case stated, and proper parties being made, the courts would, in a civil suit under the code, afford relief according to the principles of equity ; and the present judgment can not be pleaded in bar of any equitable relief that shall be thus sought by the wife.

The judgment must be affirmed.



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EMORY AND OTHERS, Respondents, v. PHILLIPS, Appellant.

1. Where in a petition it was charged that the defendant, "without leave and wrongfully entered upon a certain tract of land (describing it) of which plaintiffs were the owners and in possession thereof, &c., and took from said premises a house thereon situated, used and employed as a Methodist meeting-house or church, and carried said house off," &c.; held, that an answer, in which defendant "denies that he wrongfully entered upon the premises and took therefrom a Methodist church or meeting-house of said plaintiffs; and the defendant charges the fact to be, that the house spoken of, was his (defendant's) property and not owned or claimed by plaintiffs," (defendant also in the answer claiming permission from one of the plaintiffs to "do as he pleased with" said house, and denying plaintiff's possession,) admits the entering and taking away of the house.
2. In impeaching a witness, evidence of his general character for truth and veracity, among a majority of his neighbors, is inadmissible.

Appeal from Cape Girardeau Circuit Court.

This suit was originally commenced before the New Madrid Circuit Court, whence it was taken by a change of venue to Cape Girardeau Circuit Court. It was an action by plaintiffs, as trustees of the Methodist Episcopal church south, to recover damages for the alleged removal by the defendant of a meeting-house belonging to plaintiffs. The allegations of the petition and answer, so far as they bear upon the decision of this court, are sufficiently set forth in the opinion of the court. The finding of the court is as follows: "That said defendant, before the commencement of this suit, did enter upon the tract of land in plaintiffs' petition mentioned, and sever and take away from said land a house of the value of \$250; that, at the time of said entry and the taking of said house, the plaintiffs, as trustees of the Methodist Episcopal church south, were the owners of said land; by reason of which said entry, severance, and taking of said house, the plaintiffs have sustained damage to the sum of \$250." Judgment was accordingly given for plaintiffs for that sum.

In the course of the trial, portions of certain depositions introduced in evidence by defendant, which were offered with a

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view to impeach one G. S., a witness for plaintiffs, were excluded by the court. The following questions and answers, contained in the depositions of John Freeman and B. S. Hacker, respectively, were excluded by the court: "Ques. (to J. F.) Are you or not acquainted with G. S.; and if so, state what is his general reputation for truth and veracity among his neighbors? Ans. I am personally acquainted with G. S., and his general character for truth and veracity, among his neighbors, is bad; I have heard some of them say that they would not believe him on oath. Ques. (to B. S. H.) Are you or not acquainted with G. S., and do you know the character he bears, among a majority of his neighbors, for truth and veracity? Ans. Yes; I am well acquainted with G. S., and his general character for truth and veracity, among a majority of his neighbors, is bad, and he is not to be believed." To the exclusion of these answers defendant excepted.


Polk, for appellant, cited 13 Mo. 236; *Swift's Evidence*, 143; 3 S. & R. 336; 2 Hayw. (N. C.) 300; 3 Bibb, 268; 19 Maine, 375; 17 Mo. 550.

N. Holmes, for respondents.

RYLAND, Judge, delivered the opinion of the court.

The answer of the defendant in this case may be considered as a negative pregnant. There is no denial of his taking away the house as alleged in the plaintiffs' petition. The plaintiffs charge that the defendant on, &c., at &c., "without leave and wrongfully did enter upon a certain tract or parcel of land, (describing it,) of which they were the owners and in possession, and take from the premises a house thereon situated, used and employed as a Methodist meeting-house or church, and carried said house off and away from said premises, to plaintiffs' damage," &c.

Defendant denies that he "wrongfully entered upon the premises and took therefrom a Methodist church or meeting-house of said plaintiffs," and the defendant charges the fact to



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be, that the house spoken of was his property, and was not owned or claimed by plaintiffs. He also charges that one of the plaintiffs disclaimed the ownership, and told the defendant he might do as he pleased with the same. He denies that plaintiffs had possession of the premises.

This answer may be considered as admitting the taking away of the house in dispute, and ought to have been so construed by the court below. It does not openly deny the taking; and, although it does not frankly admit it, yet such is the evasive and improper manner of stating the defence, that the law would construe this as admitting the taking, but not the ownership. The right or ownership of the property was all then that was in dispute.

The plaintiffs charge the defendant with two important acts; the *taking away of property* is one, and the *property belonging to the plaintiffs* is the other. The defendant says, "the property belongs to me." He does not deny the taking; and, unless it is denied specifically, it is admitted. So much, then, for the taking.

Now, as to the evidence of character, the testimony of Hacker was properly rejected; the question put to him, about the character the witness bears among a majority of his his neighbors, is not the proper legal and formal question; and parties, when they attack a witness, must do so according to the rules prescribed by law, as laid down by the elementary writers. The same remarks are applicable to Freeman's testimony. In *Adams v. Hannon*, (3 Mo. 225,) this court held that "what is the character of the plaintiff for chastity, among the majority of her neighbors, with whom the witness had conversed? is, we think, a question not at all calculated to elicit an answer proper to prove general character."

But the principal fact proved by the witness, whose character was attacked, was, or ought to have been, taken by the court below as admitted; that is, the taking off the house. The defendant's answer may be considered as admitting this, by the manner it is set forth. In looking over the whole record, there appear

no grounds upon which to reverse the judgment of the court below; the finding may be considered sufficient, and it warrants the judgment. The other judges concurring, the judgment below must be affirmed.

MILES, Plaintiff in Error, v. SMITH *et al.*, Defendants in Error.

1. The personal representative of a mortgagor is a necessary party to a suit to foreclose a mortgage.

Error to Marion Circuit Court.

The facts sufficiently appear in the opinion of the court.

Pratte and Redd, for plaintiff in error. 1. The court erred in deciding that the personal representative was an indispensable party to this action. (Story's Eq. Pl. § 84, 175, 186, 196; 2 Atkins, 336; Edwards on Parties, 91, 92; 3 P. Wms, 333, note *a.*)

Vansweringen, for defendants in error.

RYLAND, Judge, delivered the opinion of the court.

This is a petition brought by the assignee of a mortgage against the heirs and widow of the mortgagor, praying judgment for the debt, that the equity of redemption be foreclosed, and that the mortgaged land be sold in the manner provided for by the statute of the state.

Ezra S. Ely sold the land to Smith, who afterwards died. Ely took from Smith the mortgage for the unpaid purchase money, which was secured also by the notes of Smith. Ely assigned the mortgage debt to Carswell and McClelland, and they assigned it to plaintiff.

The defendants rely upon the statute of limitations as a bar to the notes given for the debt, and upon an offset of money received by Ely to enter land for Smith, which Ely had author-

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ity to lay out in land for said Smith. There was a trial by jury, and verdict and judgment for defendants. After verdict for defendants, plaintiff made a motion for new trial, which was overruled. The Circuit Court decided that the personal representatives of the mortgagor, Smith, were necessary parties, and as they had not been made parties, that court dismissed the suit without prejudice to the plaintiff. Under our system of law upon a proceeding to foreclose a mortgage of land, the personal representatives of the mortgagor ought to be made parties to the proceedings.

Upon this ground alone the judgment below must be affirmed, leaving the other matters in the case still to be decided between the parties in another suit, should one be brought; the other judges concurring.

WILBUR, Respondent, v. CLARK *et al.*, Appellants.

1. A., a member of a firm composed of A., B. and C., sold out to B. and C.; and the latter, with D. and E. as securities for the performance of their obligation, assumed to pay the debts of the partnership, and in particular a note for \$488 18, due from the partnership. B. and C. failed to pay said note, and A. having paid a judgment recovered thereon in the state of Iowa against himself and his co-partners, brought a suit against D. and E. for indemnification. *Held*, that the entire correspondence between the note set out in plaintiff's petition and that described in a transcript of the record and proceedings in the Iowa suit, would warrant the court in finding that the notes described were the same note.
2. Where a cause is tried by the court sitting as a jury, it is not erroneous to refuse instructions asked by either party to the suit.

Appeal from Franklin Circuit Court.

This was a suit instituted by Horatio N. Wilbur against Jacob Clark and Randolph W. Apperson, on the following obligation, to-wit: "I, Horatio N. Wilbur, of the city of Keokuk, county of Lee, and state of Iowa, have this day sold all my interest in the shoe and boot concern of Wilbur, Newman &

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Co., to John Cunningham and Lorenzo Newman, principals, and Jacob Clark and R. W. Apperson, securities, for the sum of \$485 04, paid and to be paid in the following manner, viz. : \$184 25 in hand, and \$300 79, my part of the debts of the concern, as may be seen by reference to a note held against the firm by Manny & Weld for \$488 18, dated September 29, 1848 ; and one note held by How, Claflin & Cook for \$414 18, of the same date, each to run four months from date. It is agreed in this sale that the said purchasers and their said securities assume the payment of the above specified debts, and are hereby bound, with their heirs, executors and assigns, to release the said Wilbur from the aforesaid liabilities, by their (the said purchasers) paying the whole amount of said debts, &c. The said Wilbur this day gives up to the said purchasers all his interest in said concern ; and the said purchasers, with their securities, are bound to fulfil their part of this obligation by their subscription of their names hereunto, this 10th day of November, 1848. [Signed] Lorenzo Newman, John C. Cunningham, Jacob Clark, R. W. Apperson."

The breach of the agreement assigned by plaintiff was, that the note described above, for \$488 18, due Manny & Weld, was not paid by defendants, or by Newman or Cunningham, their co-obligors ; but that judgment was obtained in the state of Iowa on said note against plaintiff, Wilbur, for an unpaid balance due said note of \$216 92, which said judgment was satisfied by plaintiff.

In support of petition, there was introduced in evidence a transcript of the judgment and proceedings in the district court of Des Moines county, in the state of Iowa, in a case between Manny & Weld, plaintiffs, and Wilbur, Newman & Cunningham, defendants. This suit was on a note identical in description with that mentioned in the above obligation. Judgment was given in this suit against the defendants for an unpaid balance of \$216 92. This judgment was satisfied by Wilbur, by the payment of \$200. Defendants objected to the admission of this transcript in evidence : the objection was overruled.

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The cause was tried by the court sitting as a jury, and, the defendants having been found by the court to be indebted to the plaintiff in the sum of \$236 82, judgment was given against the defendants for that sum. In the course of the trial the court refused to give certain instructions asked for by defendants. Defendants appealed to this court.

Charles Jones, for appellants.

Stevenson, for respondent.

SCOTT, Judge, delivered the opinion of the court.

There is nothing in this case for which it should have been brought here. The objection to the depositions, growing out of the alleged want of notice, has no foundation in fact, as the notice, with its service, is in the record.

The entire correspondence between the note sued on in Iowa and described in the record of the judgment obtained in that state, and that set out in the petition in this cause, amply sustained the court in the finding that it was the same instrument. There was no evidence that there were two notes alike in sums, dates and terms of payment between the parties to that instrument. The evidence, under the circumstances, was almost conclusive.

The obligation incurred by the defendants, was to pay the entire debt for the plaintiff. The plaintiff, by the terms of the agreement, was to be released from the aforesaid liabilities by the defendants paying the whole amount of the said debts. One of these debts was afterwards sued on, and a judgment was recovered in Iowa against the plaintiff, which he satisfied.

As this was a trial by the court, there was no impropriety in refusing instructions. The law is properly declared on the facts found. The judgment is affirmed, with ten per cent. damages ; the other judges concurring.

Green's Adm'r v. Virden.

GREEN'S ADMINISTRATOR, Defendant in Error, v. VIRDEN AND
OTHERS, Plaintiffs in Error.

1. Where, in a case of the death of one of two partners, the survivor gives the bond required by the 50th and 51st sections of the first article of the administration act (R. C. 1845, p. 70), with approved securities; *held*, that such survivor can not be removed by the probate court and deprived of his right to the control and management of the partnership effects, on the ground that he has, since the giving of the bond, become a non-resident of the state.

Error to St. Charles Circuit Court.

James Green was, in his life-time, a partner with Virden, plaintiff in error, in a saw-mill. After Green's decease, letters of administration on his estate, bearing date April 6th, 1853, were granted to Robert H. Parks, defendant in error. Virden, July 11th, 1853, gave bond as surviving partner of the firm, in pursuance of § 51 of article 1 of the administration act of 1845, and entered upon the management of the effects of the partnership, and sold the mill and its appurtenances for \$1600. The county court of St. Charles county, April 5th, 1854, revoked the letters which had been granted to Virden as surviving partner, because he had ceased to be a resident of the state of Missouri, and on the 28th of September, 1854, granted letters *de bonis non* on the partnership effects to Parks, defendant in error. The said Parks instituted this suit October 11, 1854, against Virden and his securities, to recover \$1600 received by Virden from the sale of the mill. The breaches of the bond assigned were that Virden had not used due diligence and fidelity in closing the affairs of the partnership; that he had not applied the property thereof towards the payment of the debts of the partnership; that he had not paid over to the plaintiff, Parks, the partnership funds or property, and more particularly that he (Virden) had received \$1600 belonging to the partnership of Green & Virden, and had not applied any part thereof to the payment of the debts of

the firm, and that the debts of said firm are and remain unpaid; and, although said Virden's letters of administration on said partnership have long since been revoked, and plaintiff (Parks) has been appointed and qualified administrator *de bonis non* thereof, yet defendant (Virden) has not yet paid and delivered to plaintiff the money, effects and property belonging to the said partnership of Green & Virden.

Virden, in his answer, denied that he had not used due diligence and fidelity in closing the affairs of the partnership, and that he had failed to apply the property or any part thereof towards the payment of the debts of the partnership, and claimed a set-off of \$688 92 for moneys paid out by him on account of and for work and labor performed by him for the partnership, and about the partnership.

The court, on motion of plaintiff (Parks), struck out of the answer all that part of the answer which set up as off-set to plaintiff's demand the services performed by defendant (Virden) and his hands, wagons, teams, board of hands hired, and cash paid out for said firm, performed, furnished or paid prior to the death of James Green.

The cause was tried by the court sitting as a jury, and after making an allowance to defendant (Virden) for commission and for money paid out by him for the partnership, of the sum of \$113 17, judgment was given for plaintiff for the sum of \$1651 11.

C. D. Drake, for plaintiffs in error. The court erred in rendering judgment for the following reasons: 1. The defendant below has never ceased to be legally qualified for the "management" of the partnership effects. Having given bond therefor, as required by law, he was entitled to hold and manage those effects as surviving partner. 2. The county court of St. Charles county had no legal authority to "revoke his letters of administration," because no letters of administration were ever legally granted to him; and because, if there had been, there is no law giving that court the power to make such a re-

vocation, on the ground of the surviving partner having become a non-resident of the state.

Such a power can not properly be established by *inference*, which is the only way that the defendant in error seeks to establish it. If inference is to be resorted to, it is decidedly *against* the power, on the principle, *expressio unius est exclusio alterius*. The same law which regulates the obligations of surviving partners regulates the powers, rights, duties and obligations of executors and administrators. It declares that the letters of an executor or administrator shall be revoked, if he cease to reside in the state ; but it does not declare that, if a surviving partner cease to reside there, he shall be discharged from the management of the partnership estate. Therefore, the principle above cited applies. But further, there is a most essential difference between an administrator and a surviving partner. The former is the mere creature of the law, administering an estate for the benefit of all parties interested in it, but having, *as administrator*, no interest in it. A surviving partner is, by the general law, the actual proprietor of the partnership effects ; and he is required to give bond, simply to insure the application of those effects, *first*, to the payment of the partnership debts ; and, *secondly*, to the payment of the deceased partner's share of the concern to his legal representatives. He has no functions to perform under the orders of the county court in relation to the partnership effects. That court has no right to allow demands against him, as surviving partner, to direct him to sell property or otherwise to control him, except to cite him to account and to adjudicate upon his account. If he fail to give bond, as required by law, the partnership effects are taken out of his hands ; but if he give bond he is entitled to hold them wherever he may reside ; his bond being considered as security for their faithful application, as required by its terms. Hence, if the county court granted letters of administration in this case to Virden, such letters were a mere nullity, not being authorized by law, and the assumed

revocation of them was a nullity, for the law gave no power to make it. 3. The administrator of a deceased person has no right of action against a surviving partner, who has given bond as required by law, except in one of two cases; either, *first*, to recover what is due from the partnership to the decedent's estate; or, *second*, to recover moneys which he has been obliged to pay as administrator, and which the surviving partner had partnership effects sufficient to pay, and failed to pay. (See condition of the bond as prescribed in § 51 of the administration act.) The petition, in this case, does not aver that any thing was due from Virden to his deceased partner's estate; but proceeds upon the mere naked ground that Virden had not used due diligence in closing the partnership affairs, and had not paid the partnership debts. This was no breach of the bond, so far as the *administrator* was concerned: *the creditors of the firm* were the only persons who could sue on the bond, on the ground of the non-payment by Virden of those debts, unless the administrator had been compelled to pay debts which the survivor ought to have paid. 4. Even if any thing was due to the administrator in the settlement of the partnership affairs, he was not, by the terms of the bond, bound to pay it until the expiration of two years after the date of the bond. This suit having been brought in less than that time, after the date of the bond, can not be maintained. 5. The judgment of the court necessarily assumes that the attempted displacement of the surviving partner, made by the county court, was a legal act, and was effectual in displacing him; and therefore the points above made, in regard to that, apply here. If those points are tenable, then the finding of the court was erroneous. By the finding of the court no breach of the bond was established. The court seems to have proceeded upon the ground that the action of the county court entitled the administrator to recover from the survivor the entire fund received by him from the sale of the partnership effects, which is manifestly erroneous; for, after the survivor had once given bond, if he were even legally displaced by the county court,

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the administrator of the deceased could maintain no action against him, except in the cases designated in the third point above made.

J. D. Coalter, for defendant in error. 1. The county court had the power to remove the surviving partner upon his becoming a non-resident, and deprive him of the power of administering on the partnership effects. The statute gives this power by implication. It speaks of this as a case of *administration*, and requires the surviving partner to give bond "in such sum and with such securities as is required in *other* cases of administration." (See § 50, 52 and 58, art. 1, tit. "Administration," R. C. 1846, p. 70, 71 and 72.) It is clearly within the spirit and meaning of the statute that neither this nor any other administrator of a deceased person's effects shall be a non-resident of the state. 2. The court committed no error in striking out part of the defendant's answer. The defendant (*Virden*) sought to set up his individual claim, as one of the partners, as an offset against the demand made upon him to turn over the partnership effects. This he had no right to do.

SCOTT, Judge, delivered the opinion of the court.

The defendant (*Virden*) and James Green, deceased, were partners. Green died, and the defendant (*Virden*), his partner, gave the bond required by the statute, and retained the control of the partnership effects. Afterwards, the county court of St. Charles county removed *Virden* and revoked the powers granted to him, because he became a non-resident, and appointed Parks, administrator *de bonis non*, (as he is termed in the proceedings,) of the partnership effects, who brings this suit on the bond given by *Virden* as surviving partner, alleging breaches of its several conditions. The record raises the question, whether a surviving partner, who gives the bond required by the statute for the due management of the partnership effects, can, for non-residence, or any other cause, be removed by the probate court in the same manner as an ordinary administrator.

The provision requiring the surviving partner to give bond for the use of due diligence in the management of the partnership effects, is a new one, in derogation of the rights of the surviving partner, as they existed at common law. All interference with his rights must have a support in the statute law, and we are restrained from going farther in diminishing his control over his goods than the words of the law fairly warrant. It is to be borne in mind that the survivor is the owner of one half of the effects. Where the surviving partner fails to give bond, and the administrator of the deceased partner takes charge of the partnership effects, he can not prosecute suits in his own name as administrator, but he is compelled to use the name of the surviving partner. When the survivor elects to take the control and gives the bond required by law, the powers to be exercised over him are statutory. The bond is a pledge for the security of that portion of the effects belonging to his deceased partner's estate committed to his charge. The 52d section of the 1st article of the administration law enacts that "the county court shall have the same authority to cite such survivor to account, and to adjudicate upon such account, as in the case of an ordinary administrator, and the parties interested shall have the like remedies, by means of such bond, for any misconduct or neglect of such survivor as may be had against administrators." There is nothing here like a power of removal. On the contrary, from the language of the statute, it would seem that the remedy against the survivor is to be had by means of the bond. It would be against all principle to assume by implication a power of taking away the right of control which a man has over his own property. There is no hardship in this conclusion. The sureties of the survivor must be such as the law requires for administrators. They will be residents of the county, and if the survivor absents himself, his bond and sureties will be accessible to all who may suffer by reason of his neglect.

The judgment is reversed ; the other judges concurring.

Holliday v. Atterbury.

HOLLIDAY, Respondent, v. ATTERBURY, Appellant.

1. The supreme court will not reverse a judgment of a lower court because the verdict of the jury is against the weight of evidence.

Appeal from Shelby Circuit Court.

This was a suit originally instituted in the Circuit Court of Monroe county, whence it was taken by change of venue to the Circuit Court of Shelby county. The plaintiff (Holliday) prayed judgment for the possession of a certain negro slave named Nance, and her child, and damages for their detention. Defendant (Atterbury), in his answer, denied plaintiff's alleged ownership of said negro slave and child, and claimed to own them in his own right.

On the trial, the following facts appeared in evidence: The slave Nance had belonged to plaintiff (Holliday), whose daughter married defendant (Atterbury) in the year 1840. In 1843, the slave Nance was in possession of Atterbury and remained so until some time in 1853, about eighteen months after the death of Mrs. Atterbury, when, upon her going to the house of plaintiff (Holliday), she was retained by him and prevented from returning to defendant's possession. Holliday hired Nance to one Brown, with whom she remained a few days, and from whose possession she was taken by defendant, without the permission and against the objection of the said Brown; whereupon the present suit was brought. There was evidence *pro* and *con* bearing upon the question whether Holliday, the plaintiff, had made a *gift* or a *loan* of the slave Nance to his daughter, Mrs. Atterbury. It is unnecessary to set this forth.

The court, on motion of plaintiff, gave the following instructions, to-wit: "1. Although the sending of the negro woman in contest to the defendant and his wife, the daughter of plaintiff, unaccompanied by a declaration that the negro was placed with defendant and his wife as a loan, raises a presumption that the negro was a gift, yet this is a mere presump-

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tion, subject to be rebutted and explained by evidence. 2. If the jury believe, from the evidence in the case, that said negro girl was not placed by plaintiff with defendant and his wife as a gift, and was not so meant and intended, and said negro was not in fact given by plaintiff to defendant and his wife, they should find for the plaintiff. 3. If the plaintiff exhibited to defendant a list of advancements in 1844, that he said he had made to the defendant and his wife, and requested defendant and wife to sign a receipt for the same as advancements made to them at that time, and said defendant and wife signed a receipt for said advancements, and said negro was not included in the list and receipt, this is evidence from which the jury may find that the parties did not understand that said negro was given to defendant or wife. 4. If the jury find from the evidence in the case that the negro girl was not understood by the parties to be placed in possession of defendant or his wife as a gift, they should find for the plaintiff, although the plaintiff might not have said to defendant or his wife at the time of placing the negro there, that she was put there as a loan; and it is competent to find the fact of gift or loan from all the evidence in the cause." To the giving of the foregoing instructions for plaintiff defendant excepted. The defendant then asked and the court gave the following instructions: "1. If the jury believe from the evidence that the plaintiff sent the negro Nancy with his married daughter, Mrs. Atterbury, to her house, and permitted her to remain there to serve his said daughter, the law presumes that it was a *gift* of said negro to his said daughter, and the jury must find for the defendant, unless plaintiff has proved to the satisfaction of the jury that he only loaned said negro to his daughter, and that it was expressly understood not to be a gift at the time, they must find for defendant. 2. Although the jury may believe from the evidence that the defendant has admitted that plaintiff did not give said negro to his daughter nor to himself, yet *plaintiff* is not bound by such admission, if they were made in ignorance of his rights. 3. The jury should not take into consideration any

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declaration made by plaintiff, in the absence of defendant, in regard to their title to said negro in question. 4. If the jury believe from the evidence that plaintiff sent the negro Nancy to defendant's house, with his daughter, and that said negro remained there a considerable length of time, they must find for defendant, unless the plaintiff has proved to their satisfaction in this case that it was expressly understood between the parties at the time that the negro was sent as a loan and not as a gift."

Wm. M. Cooke, for appellant, cited *Martin v. Martin*, 13 Mo. 66.

Glover & Richardson and Carr, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The only point in this case is, that the verdict is against the evidence, and the defendant therefore contends that the Circuit Court ought to have set it aside and granted a new trial.

In looking over the evidence preserved in the bill of exceptions, we have no doubt that it was sufficient to carry the case to the jury, and this court does not disturb a verdict because it is against the weight of evidence. There is no question of law for our adjudication; the instructions were given for both parties as they were asked for, and these instructions presented the law of the case fairly to the jury.

It has long been the practice of this court to refuse to interfere with the verdicts of juries, because it was considered that the evidence did not support such verdicts. These matters more properly employ the discretion of the lower courts, and we will not interfere with such discretion.

The judgment must be affirmed; the other judges concurring.

MITCHELL, Appellant, v. GRIFFITH, Respondent.

1. Where, in a suit executed in the year 1847, while the act of Jan'y 15, 1847, (sess. acts, 1847, p. 63,) regulating the interest of money, was in force, the jury found that the interest reserved—ten per cent.—exceeded the lawful rate of interest by four per cent.; *held*, that the court committed no error in deducting from the principal of the note the interest upon the same at four per cent. for the whole time the note was running, that is, from its date to the date of the judgment, and in giving judgment for plaintiff for the balance only of the principal.
2. Nor is it error in such a case to give judgment against plaintiff for costs.

Appeal from Hannibal Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

R. F. Richmond, for appellant. The jury having found for the plaintiff (appellant), no motion was made for a new trial. The error complained of is in the judgment rendered by the court after verdict. So far as the plea of usury was concerned, there was no dispute about the facts, and no issues to be settled not apparent from the pleadings and papers. The note sued on was dated August 16th, 1847, and made payable on the 1st November following, with ten per cent. interest from date. The respondent sets forth in his answer, and shows by his proof, that this note was for a deferred payment on the purchase of a tract of land.

For appellant it is contended, 1. That the note was not for usurious interest under the act of 1847. 2. The defendant was *estopped* by his own act to set up the plea of usury. 3. The court, at all events, erred in deducting from the principal sum named in the note four per cent. per annum from the date of the note till the judgment, as *four per cent.* only from the face of the note should, under any circumstances, have been deducted—as the note called for ten per cent. being four per cent. only above six per cent., the legal interest.

Glover & Richardson, for respondent.

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RYLAND, Judge, delivered the opinion of the court.

This is a suit upon a promissory note by plaintiff, as assignee of Ely, against the defendant. There was a trial by jury and verdict for plaintiff, with a special finding that the interest reserved exceeded lawful interest four per cent. The court deducted from the principal of the note a sum equal to four per cent. per annum on the amount of the note, and gave judgment for the plaintiff for the balance of the principal, and then gave judgment against the defendant in favor of the school fund for six per cent. interest per annum, on this balance of principal, and rendered judgment against the plaintiff for costs. The plaintiff excepted to the opinion of the court in rendering the above judgment, and brings the case here by appeal, and asks for a reversal of this judgment, and for judgment to be rendered in his favor for the principal of the note and interest thereon at ten per cent.; but if this be denied, then for judgment for the principal of the note, less four per cent.

The record is a voluminous one, and full of details of evidence and instructions; but this court will pay no attention to them, as the only matters complained of rest entirely upon the judgment given by the court on the verdict. The plaintiff did not move for a new trial, and he complains of the court in rendering the judgment only.

This case presents questions in regard to a proper construction of the act of 1847 regulating interest. However, before I notice that act, it may be well enough to notice the point raised by the plaintiff's counsel, that this is no case of usury; that it is a note given for a deferred payment of an instalment due on the purchase of a tract of land, and is not a borrowing and lending, nor such a transaction as can be considered usurious under our statute. The plaintiff, in his petition, describes the note as bearing date the 16th August, 1847, for the sum of three hundred and seventy-nine dollars and seventy-two cents, payable on or before the first day of November ensuing, *with interest on the same at ten per cent. per annum* from date,

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for value received, payable to Ira Stout. Now at the date of this transaction, our statute did not allow of more than six per cent. interest. The testimony shows that Griffith purchased a tract of land from Stout for \$6284, cash, all paid except the note in suit here; and, from the note, it is plain that more than lawful interest was to be paid for the forbearance of the sum therein specified for the short time between 16th August and 1st November, 1847. Now it was competent for these parties to have so contracted that usury could not have been predicated on the balance of the consideration money not paid down; but we think that they have failed to do so in this case, and that the note calls upon its face for the interest not allowed by law. In the case of *Beete v. Bidgood*, (7 Barn. & Cress. 453; Chit. on Cont. 710,) where a contract was made for the sale of an estate at a certain price, and it was agreed that this should be paid by instalments at certain future days, with interest calculated at six per cent. per annum, and promissory notes were given for those sums compounded of the instalments and that which was called interest, the court of king's bench held that the whole must be considered as the purchase money of the estate, and that the bargain was not usurious. There is nothing in the case before us to satisfy us that it was the bargain, at the time the purchase of the land was made, that the note was to bear ten per cent. interest from date, as a part of the consideration money to be paid for the land. The money was nearly all paid down, and for the small balance still unpaid the note was given, and ten per cent. interest from date was agreed to be paid. It was a cash sale, and there does not appear to have been any contract or understanding in regard to the note at the time. We consider, then, that it was a transaction in which usury could make its appearance, and the note and finding of the jury satisfy us on this point. (*Evans v. Negley*, 13 Serg. & Rawl. 218.)

In an action where usury is found by a jury on defendant's plea, or by the finding of the court, "the court shall render judgment on such verdict or finding for the real sum of money

or price of the commodity actually lent and advanced or sold, after deducting from the real sum of money or price of the commodity, as aforesaid, the amount of interest contracted or agreed for, received or taken, over and above the interest at the rate of six per cent. per annum, and shall render judgment for interest on the real sum of money or price of the commodity, as aforesaid, after making the deduction as aforesaid, at the rate of six per cent. per annum; upon which judgment the court shall cause an order to be made, setting apart the whole interest for the use of the county in which the suit may be brought, for the use of common schools, &c., and the defendant may recover his costs." (Sess. Acts, 1847, p. 63.) We agree with the construction put upon this statute by the court below. Where the note has been running more than a year, it is not sufficient by the act to deduct from the principal the excess of interest agreed on above six per cent.; but the deduction must be the amount agreed for "over and above the interest at the rate of six per cent. per annum." When the note calls for ten per cent. interest and has run only one year, it is sufficient to deduct four per cent.; but if it has run more than one year, the interest agreed for must be calculated for the whole time it has run, and then the excess over the interest at six per cent. per annum is to be deducted. This view of the act accords with the judgment below, and the court has the power to give the defendant costs.

Upon the whole record, the majority of this court is of the opinion that the judgment below should be affirmed. It is accordingly affirmed; Judge Leonard concurring; Judge Scott dissenting.

GOODE AND OTHERS, Appellants, v. GOODE AND OTHERS, Respondents.

1. A court of equity has no jurisdiction to reform a will on the ground of mistake by the draughtsman in drawing the same.

Appeal from Franklin Circuit Court.

Petition to the Franklin Circuit Court praying for the reformation of a will. The petition is as follows: "Plaintiffs state that John Goode, late of the county of Franklin, departed this life on or about the 18th day of April last, leaving a writing purporting to be his last will and testament, bearing date July 12, 1854, with a codicil thereto annexed bearing date April 16, 1855, which writing was admitted to probate on or about the 27th day of April, 1855, and upon which letters testamentary were granted on the day last aforesaid to Edward J. Goode and Flavius J. North, who were by said writing appointed his executors; the original of which writing is herewith exhibited. Plaintiffs state that that portion of said writing, a copy of which is given below, is not and was not at time of the execution of said writing the last will and testament of the said John Goode, but the same was inserted in said writing by a mistake of the draughtsman, and escaped the notice of the said testator at the time it was read over to him and signed and acknowledged by him. The portion of said writing which is not the will of the said John Goode is as follows: 'The purchase money of which [that is, of mill farm and tract and mill] (with the exception hereafter made) my said executors shall distribute equally to my sons Langston and Nathaniel, and my daughters Frances, Virginia and Margaret, share and share alike.'

"Plaintiffs aver that the names of Langston and Nathaniel, and Frances, Virginia and Margaret, were inserted in said clause, above set out, by mistake, and at the time of the execution of said writing he thought and believed, and to the time of his death he thought and believed he had devised said purchase (excepting the \$2500) to all his children, share and share alike, the children of a deceased child taking the share of their parent; that said will, as it stands in connexion with the codicil, is ambiguous, uncertain and contradictory as to said clause, and the same can not receive a sensible construction, if the clause above set out be not reformed. Plaintiffs pray that the

probate of said writing, as to the part set forth, may be set aside, and said writing so corrected and reformed as to become the true last will and testament of the said John Goode, and that the same, as reformed and corrected, be admitted to probate, and for such other and further relief as the facts of the case shall warrant."

The whole passage, from which above extract is taken, is as follows: "It is my will, and I authorize and empower my executors, to sell and convey in fee simple, to the best purchaser, my mill farm and tract and mill, situate on the Bourbeuse river, *the purchase money of which (with the exception hereafter made) my said executors shall distribute equally to my sons Langston and Nathaniel, and to my daughters Frances, Virginia and Margaret, share and share alike.* And twenty-five hundred dollars of the said purchase money (\$2500) shall be held in trust by said executors for my sons Langston and Nathaniel, and my daughters Frances, Virginia and Margaret, and the same shall be by my executors loaned; and the interest upon the said sum, to-wit, \$2500, shall be collected annually and paid over to my daughter Agnes Gregory, and to John J. Goode, as maintenance during their lives; and at their death the said \$2500 shall be distributed to my sons Langston, Nathaniel and John J. Goode, and to my daughters Frances, Virginia and Margaret, share and share alike." "After all the bequests are paid and satisfied, the residue and remainder of my estate I wish distributed among all my children, share and share alike."

The petition was demurred to by the defendants; the demurrer was overruled, and judgment given for defendant; defendant appealed to this court.

T. Polk, Frissell and C. Jones, for appellants. 1. For the purposes of this case it stands admitted by the record that the mistake set out in the petition was in point of fact made, and in the manner there stated. Now one of the grand branches of equity jurisdiction is mistake. (1 Story's Eq. § 110, *et seq.*) 2. A mistake in the name of a devisee may be correct-

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ed. (*Beaumont v. Fell*, 2 P. Will. 140; *Dowset v. Sweet*, 1 Ambler, 175; *Parsons v. Parsons*, 1 Ves. jr., 266; *Smith v. Coney*, 6 Vesey, 42.) 3. So, a mistake in the number of the devisees may be corrected. (*Stebbing v. Walkey*, 2 Bro. Ch. 85; 2 Vesey, 560; *Tomkins v. F.*, cited 3 Atk. 257; *Hampshire v. Pierce*, 2 Vesey, sr., 216.) 4. So a mistake in the thing willed may be rectified by a court of equity. (*Selwood v. Mildway*, 3 Vesey, 306; *Riggs v. Myers*, 20 Mo. 239.) 5. The court below should have held that so much of the writing as is a mistake, and was inserted in the testator's will by the draughtsman, through mistake, was not a part of his will, and should not have sustained the demurrer. (*Hippesley v. Horner*, in note to *Turner & Rus.* 48, 11 Eng. Chan. R. 28.) And by declaring the portion of the writing, inserted in the will by mistake, not to be a part of the testator's will, the intention of the testator, as shown by the petition, and as is admitted by the demurrer, would have been completely carried into effect. For, by a subsequent clause in the will, all his children, share and share alike, are made residuary legatees; and the clause that was inserted in his will by mistake gives the purchase money of the mill tract, farm and mill (which he willed to be sold) to a part of his children, Langston, Nathaniel, Frances, Virginia and Margaret, instead of to *all* of his children, share and share alike, as it was the intention of the testator it should have been. 6. The will, as it stands in connection with the codicil, is contradictory and in conflict with the codicil, and said will and codicil can not have a sensible construction together, unless the portion of the will inserted by mistake be held to be no part of the testator's will. 7. It is admitted by the record that said will, as it stands in connection with the codicil, is ambiguous and uncertain, and contradictory as to said clause, and the same can not receive a sensible construction if the clause set forth in the petition be not reformed. (See *Wigram on Wills*, 170, 172; *Jarman on Wills*, 160, 318; 20 Mo. 239; *Ram on Wills*, 272; *Flood v. Hawser*, 1 Nott & McC. 321; 1 Sto. Eq. 179, 188; 2 Verm. 517; 6 Term R. 671;

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1 P. Wm's, 421 ; 2 P. Wm's 209 ; 2 Vern. 593 ; 1 Bro. Ch. 223 ; 6 Ves. 385 ; 1 Williams on Exec'rs, 299.)

Stevenson and Johnson, cited Williams on Executors, 299 ; 1 Jarm. on Wills, 347, note ; 2 Rop. on Leg. 320-2 ; R. C. 1835, statute of wills, § 4.

RYLAND, Judge, delivered the opinion of the court.

Some time in April, 1855, John Goode died in Franklin county, having previously made his last will, with a codicil thereto. This will and codicil were admitted to probate about the last of April, 1855 ; and this petition is brought by some of the legatees of said John Goode to reform the will, so as to make it correspond with the alleged intention of the testator.

To this petition a demurrer was filed, which was sustained by the court below, judgment rendered thereon for defendants, and the plaintiffs bring the case here by appeal.

This action is substantially a proceeding to correct a mistake in a will, and we hesitate not to declare that such a proceeding can not be allowed or sustained ; and, consequently, that the Circuit Court decided the case properly, and its judgment must be affirmed.

Adams, in his treatise on Equity, p. 172, says : " A will can not be corrected by evidence of mistake, so as to supply a cause or word inadvertently omitted by the drawer or copyer ; for there can be no will without the statutory forms, and the disappointed intention has not those forms. But it seems that if a clause be inadvertently introduced, there may be an issue to try whether it is part of the testator's will." Jarman says : " Evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will." (1 Jarman on Wills, 353.) In *Mann et al.* against the executors of *Mann et al.* (1 Johns. Ch. Rep. 231,) Chancellor Kent says : " It is a well settled rule that seems not to stand in need of much proof or illustration, for it runs through all the books, from *Cheny's case* (5 Coke, 68)

down to this day, that parol evidence can not be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specific cases : 1st, where there is a latent ambiguity arising *dehors* the will, as to the person or subject meant to be described ; and, 2d, to rebut a resulting trust : all the cases profess to proceed on one or the other of those grounds." After citing a list of authorities on the doctrine, he proceeds : " If there be a mistake in the name of the legatee, or there be two legatees of the same name ; or if the testator bequeath a particular chattel, and there be two or more of the same description ; or if, from any other misdescription of the estate or of the person, there arises a latent ambiguity, it may and must be explained by parol proof, or the will would fall to the ground for uncertainty. When a latent ambiguity is produced, according to the language of the courts, (Lord Thurlow, in 1 Ves. jr., 259, 261, 415, and Lord Kenyon, in 7 Term Rep. 148,) in the only way in which it can be produced, viz., by parol proof, it must be dissolved in the same way ; and there is no case for admitting parol evidence to show the intention upon a latent ambiguity on the face of the will. They are all cases of latent ambiguity, and the objection to supply the imperfection of a written will, by the testimony of witnesses, is founded on the soundest principles of law and policy. 'It would be full of great inconvenience,' say the justices in Cheny's case, 'that none should know by the written words of a will what construction to make or advice to give, but that it should be controlled by collateral averments out of the will ;' and if collateral averments be admitted, to use the words of Sir Mathew Hale, in Fry and wife v. Porter, (1 Mode, 310,) 'how can there be any certainty ? A will may be any thing, every thing or nothing. The statute appointed the will to be in writing, to make a certainty ; and shall we admit collateral averments and proofs, and make it utterly uncertain ?'"

Chancellor Kent says : "Perhaps a solitary *dictum* may occasionally be met with (for there are volumes of cases on the

subject of wills, *immensus aliarum super alias cumulus*) in favor of the admission of parol proof to explain an ambiguity or uncertainty appearing on the face of a will; though Lord Thurlow says there is no such case. If there be, we may venture to say it is no authority; the only apology for personal proof in any case is the necessity of the thing, because the ambiguity is so complete as to elude all interpretation, and would destroy the devise altogether unless explained." Andress v. Weller, 2 Green's Ch. Rep. 604, supports the same doctrine.

Judge Story, in his equity jurisdiction, (1 Sto. Eq. § 179,) says: "In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them when apparent on the face of the will, or are to be made out by construction of its terms; for, in cases of wills, the intention will prevail. But, then, the mistake must be apparent on the face of the will, otherwise there can be no relief; for, at least, since the statute of frauds, which requires wills to be in writing, (whatever may have been the case before the statute,) parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity."

Parol evidence of the intention of the testator is inadmissible to vary the express terms of a will. (*Avery et ux v. Chappel*, 6 Connec. 270; *Earl of Newburgh v. Countess Dowager of Newburgh*, 5 Maddox Ch. R. 364.)

Apply the universally admitted doctrine of courts of equity to this case now before us, about reforming wills or correcting mistakes in wills, and there will remain no doubt of the correctness of the decision of the court below.

Here, the parties (plaintiffs) seek to change a sentence or paragraph of the will of the testator, by adding the names of other legatees, so as to alter materially the bequests,—indeed, seek to cut out one paragraph in effect and set up a new one. Admit this doctrine, and you may as well repeal the statute requiring wills to be in writing, at once. Witnesses will then make wills and not testators.

Upon the full examination of this case, and the law arising on it, there can be no doubt of the correctness of the judgment of the court below, and it is affirmed by all the judges.

COUNTY OF ST. CHARLES, Appellant, v. POWELL, Respondent.

1. The rule of the common law, embodied in the maxim "*nullum tempus occurrit regi*," and adopted generally in this country, applies only to the state at large, and not to the political subdivisions thereof. The statute of limitations runs against the municipal corporations and other authorities established to manage the affairs of the political subdivisions of the state, as against private individuals. The immunity was at common law an attribute of sovereignty only.
2. The sums received by the several counties of this state out of the "road and canal fund" under the several acts of the general assembly, (see R. C. 1835, p. 553; Sess. Acts, 1836-7, p. 108-9,) belonged exclusively to the counties, though affected with a trust for local purposes; and the statute of limitations would run against the said counties on bonds executed in their favor by persons to whom portions of said fund had been loaned.
3. The fact that the obligor of such a bond becomes a judge of the county court, before the time of the limitation, ten years, expires, will not deprive him of right to set up the statute as a bar to a recovery.

Appeal from St. Charles Circuit Court.

This was a suit commenced April 19, 1855, founded upon the following obligation: "\$175. Twelve months after date, we or either of us promise to pay to the County of St. Charles, one hundred and seventy-five dollars, to bear interest at the rate of ten per cent. per annum from date till paid, it being for that amount borrowed of the road and canal fund of said county. Witness our hands and seals this 5th day of February, 1841. [Signed] Ludwell E. Powell, (seal). T. Yosti, (seal). Wm. Echert, (seal)."

It was alleged in the petition that the defendant, Powell, was justice of the county court of St. Charles county, from 1850 to September, 1854, "and as such, with his associates, had the

control and management of all bonds, notes and evidences of debt due said county for the use of the road and canal fund."

The defendant relied in his answer upon the statute of limitations.

Upon the trial, the bond above set out was proven and given in evidence; also an endorsement upon the same of a credit of \$8 75, paid June 29th, 1842. It was also proven that Powell was elected justice of the county court of St. Charles county, in August, 1850, and was presiding justice of said court until September, 1854.

Upon this proof, the court gave judgment for the defendant on the ground that the debt was barred by the statute of limitations.

C. C. Whittelsey and T. Cunningham, for appellant. 1. The county of St. Charles holds the road and canal fund for the benefit of the state, and against the state the statute of limitations does not run. "*Nullum tempus occurrit regi.*" (Broom's Legal Maxims, 27; Parks v. State, 7 Mo. 194; Marion county v. Moffett, 15 Mo. 605; State v. Fleming, 19 Mo. 607; United States v. Kirkpatrick, 9 Wheat. 720; 15 Mo. 604; R. C. 1835, p. 554; 3 Statutes at large, 674.) 2. The defendant should not be permitted to avail himself of the time during which he was the justice of the county court. If any thing, its neglect should be considered as a presumptive new promise, as he had the authority and influence to stay suit. The payment was made in June, 1842, and ten years from that date would have given him the right of action until June, 1852, and for nearly two years after that time the defendant prevented suit, and the county should have that time to sue after he ceased to be a justice. The new county court ordered suit brought when they found the bond unpaid and still due. The principle should be applied that a trustee shall not avail himself of the statute while trustee. (Taylor v. Blair, 14 Mo. 437.) As a justice of the court, he should certainly be considered as placed in a position of trust, which should forbid his doing any thing to the injury of those with whose interests he

stood charged. Upon these principles, therefore, the answer should have been overruled, and the issue should have been found for the plaintiff, and judgment given for the face of the bond, with interest.

J. Coalter and *Alexander*, for respondent. The two grounds on which it is supposed that the statute will not run in this case are, 1. That the note was given for the benefit of the road and canal fund, and that said fund belongs to the state, and therefore the note can not be barred. This is not true in point of fact; the fund has been distributed among the several counties of the state, with no provision that it shall ever, in any event, revert to the state. (R. C. 1835 and 1845, tit. "Road and Canal Fund." 2. The other point, that the statute will not run, because the defendant was from 1850 to 1854 justice of the county court, is equally untenable. He was one of the three justices, and, of course, did not control the court. No order of the court was necessary to the institution of a suit against him. Besides, the statute of limitations commenced to run February 5, 1842, more than eight years before he was elected justice, and having once commenced running, did not stop. (See *Saunders v. Perkins*, 12 Mo. 238; *Smith*, adm'r of *Taylor*, v. *Newly*, 13 Mo. 159.)

LEONARD, Judge, delivered the opinion of the court.

In 6 Bacon's Abr. tit. "Prerogative," E. 5, it was said that when a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king should not be bound, unless the statute is made by express words to extend to him. It is upon this principle that, by the English common law, statutes of limitations do not apply to actions brought by the crown, unless there be an express provision including it; and Story (*United States v. Hoar*, 2 Mason, 312,) after referring to the reason given by Blackstone (1 Com. 247,) says that the true reason of the king's prerogative, "*nullum tempus occurrit regi*," is to be found

in the great public policy of preserving the public rights, revenues and property from injury and loss by the negligence of public officers. But whatever the reason of the prerogative may have been, it was originally adopted, it is believed, in all the American states, governed by the common law. It seems, however, to have had no place in the Roman law of the prescription of actions, except to enlarge the time within which the public authorities, both general and local, were required to bring their suits. (1 Mackeldey's Civil Law by Kaufman, 200, 202.) The new French code expressly renounces it (Civil Code, sec. 2227); and our own state has recently done so too. (Practice Act, 1849, art. 2, § 10.)

The immunity, however, it seems, was, even at common law, an attribute of sovereignty only, and did not belong to the municipal corporations or other local authorities established to manage the affairs of the political subdivisions of the state. It was so expressly held in the Lessee of the city of Cincinnati against the First Presbyterian church, (8 Ohio, 309,) and in *Armstrong v. Dalton*, (4 Dev. N. C. 569); and we are not aware of any case to the contrary. In Marion county against *Moffett*, (15 Mo. 604,) the omission of a public functionary to do an act required by law for the security of the public interest, was not allowed to operate as a release of the security; but the decision had nothing to do with the application of the statute of limitations to cases of that character. The money here sued for belonged to the county and not to the state at large. It was vested in the county by a legislative donation—impressed, it is true, with a trust for local improvements; but yet it belonged exclusively to the county, although for local and not for general purposes.

It is scarcely necessary to remark, that the fact that the defendant was a member of the county court during part of the time of the bar, is no answer to the statute. If the defendant has been guilty of such conduct in the discharge of his official duties as to render him amenable to the law, he must be called to answer in a proper proceeding instituted for that purpose. The judgment is affirmed.

GREEN, Respondent, v. MOFFETT & STILLWELL, Appellants.

1. By the statute law of this state (see sess. acts, 1841, p. 86; R. C. 1845, p. 1077,) a "ton" of hemp is 2000 pounds avoirdupois and not 2240 pounds.
2. Evidence to the effect that by custom or mercantile usage a "ton" of hemp consists of 2240 pounds instead of 2000 pounds, is not admissible in the interpretation of contracts.

Appeal from Hannibal Court of Common Pleas.

This is a suit brought to recover a balance of money claimed to be due upon hemp delivered to defendants under a contract of which the following are the material portions: "Hannibal, Missouri, April 14, 1852. This agreement, this day made and entered into by and between Erasmus M. Moffett and Brison Stillwell, of the first part, and William N. Green, of the second part, witnesseth: that said Green has this day sold to the said Moffett and Stillwell thirty-five tons of hemp of the best quality brought to this market (except choice selections), to be baled in sound and clean second hand gunny bags, for which the said Moffett & Stillwell are to pay said Green seventy dollars per ton; also fifteen tons of hackled hemp, at one hundred and ten dollars per ton, of strictly choice quality and thoroughly cleansed, to be as nearly uniform in color as practicable, to be put up in new gunny bags, and the whole to be stored by the said Green in his brick warehouse, in, &c. The hemp to be delivered in lots of from five to ten tons into said warehouse, and the whole delivery to be made by the first of September next. One half of the money to be paid on each delivery, and the balance in two months after the final delivery, &c. In witness whereof, we have hereunto set our hands the day and year first above written. [Signed] E. M. Moffett, B. Stillwell, W. N. Green."

Upon this instrument there were the following endorsements: "W. N. Green is hereby authorized to deliver the thirty tons of hemp, named in this contract, without covers, the said Green

to deduct one dollar per ton as a consideration. [Signed] B. Stillwell." "Received of William N. Green, twenty-seven thousand nine hundred and two pounds of hemp on the above contract. October 1st, 1852. [Signed] E. M. Moffett, B. Stillwell."

It was admitted in the pleadings that the time within which the hemp was to be delivered was extended by the parties, and it was verbally stipulated that plaintiff might deliver said hemp at any time before November 13th, 1852.

Plaintiff alleged in his petition that on the 1st day of October, 1852, he delivered to defendants 2287 pounds of hemp, covered with gunny bags, which, at the rate as specified in the agreement of \$70 per ton, amounted to the sum of \$80 04; that on the same day he delivered to defendants 25,615 pounds of said hemp, not covered, at the rate of \$69 per ton, amounting to the sum of \$883 71; that the whole indebtedness thereby incurred amounted in the aggregate to the sum of \$963 75. Plaintiff admitted the receipt from defendants, on account of the hemp delivered as above, of \$450 25, and claimed judgment for a balance of \$513 50.

Defendants, in their answer, admit the delivery of the 27,902 pounds of hemp as stated in the petition; they allege that, at the time of the delivery, they paid plaintiff one half the contract price of the hemp delivered and twenty dollars by way of advance on the contract; this twenty dollars not being due to plaintiff when he received the hemp, but being advanced as a matter of favor. They further allege that they have at all times been ready, and willing to keep and perform all the stipulations of the contract, and have so kept and performed them so far as they were bound to do; that plaintiff has not kept or performed said contract, but has broken and violated the same, in this, that plaintiff has done nothing towards fulfilling his contract, save the delivery to defendants of the 27,902 pounds of hemp, although, from time to time, before and on the said 13th day of November, 1852, he has been and was repeatedly requested by defendants to deliver them the hemp as he was

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bound by the contract to do ; he being at the same time informed that defendants were ready, able, willing and anxious to pay him for the hemp, when delivered, so as in all things to comply on their part with the contract ; that on the 13th day of November, 1852, defendants tendered to plaintiff in cash the sum of \$1592 75, and offered to pay the same to him, provided he would deliver to them the said hemp, but plaintiff then and there failed and refused so to do. This sum of \$1592 75 was the amount which it was estimated would have been due to plaintiff by said contract on said 13th day of November, had he then delivered the hemp to defendants as by them requested.

Defendants also claim damages for the breach of the said contract ; and allege a rise in the price of hemp between April 14th, 1852, the date of the contract, and November 13th, 1852.

In an amended petition plaintiff alleged that he did deliver the hemp according to the terms of the contract, but that defendants refused to receive it, or to pay him or tender to him the amount due for said hemp according to the terms of the contract, or to pay him the amount due for the hemp received by them as set forth in the original petition ; that he (plaintiff) complied in all respects with his stipulations under the contract, but that defendants wholly failed to comply with their obligations under said contract, or to pay plaintiff the money due him for said hemp under the terms of said contract.

On the trial, evidence was offered tending to show that plaintiff had stored in the warehouse named in the contract a quantity of hemp equal to that remaining undelivered under the contract ; that he was ready, and willing, and offered to deliver to defendants the portion of the hemp so undelivered, upon the payment of the sum agreed upon in the contract, but that he refused to deliver the hemp unless he were first paid the money due under the contract upon delivery, with defendants' notes, due sixty days from date, for the sum remaining unpaid. The evidence also showed that defendants offered to make the pay-

ments due under the contract upon the delivery of the hemp, but would not make any payments until the hemp should be delivered; that on the 13th day of November, 1852, defendants offered to pay plaintiff the sum of \$1592 75 upon delivery of the hemp remaining undelivered under the contract of April 14th, 1852, that being the sum estimated to be due plaintiff, in cash, upon such delivery; that plaintiff refused to so deliver, although delivery was demanded by defendants.

Defendants offered the testimony of certain witnesses to prove, that by usage and custom of merchants and hemp-dealers in Hannibal and elsewhere in Missouri, a "ton" of hemp has invariably been understood to mean 2240 pounds avoirdupois. The testimony was rejected by the court, and to its exclusion defendants excepted. Defendants also offered to prove by a witness that plaintiff had said in his presence and hearing that the word "ton," used in the contract sued on, was intended by both the parties, when they signed it, to mean 2240 pounds. This testimony was excluded on the objection of plaintiff.

The evidence showed a rise in the price of hemp between April 14th, the date of the contract, and November 13th, 1852.

The following instructions were asked by the plaintiff: "No. 3. If the jury find from the evidence that the defendants received from Green, the plaintiff, 2285 pounds of covered hemp and 25,615 pounds of uncovered hemp on the contract read in evidence, they will find for the plaintiff the amount of said covered hemp, computing the same at \$70 per ton, and said uncovered hemp at \$69 per ton; and estimating each ton to consist of 2000 pounds avoirdupois weight; deducting therefrom such amount as the defendants may have paid on account of the same. 4. The plaintiff (Green) had the legal right to retain the custody and possession of the hemp, after it was stored in the warehouse, until the defendants had paid the amount by the contract stipulated to be paid or tendered the same. 5. If

the jury find from the evidence that the plaintiff (Green), from the 10th to the 13th of November, 1852, had stored in the brick house, in the contract named, 72,569 pounds of hemp, in accordance with his contract, and that he at the same time notified the defendants of his having the same stored as aforesaid, that this was a compliance on his part of the contract. 6. That before the defendants can recover any damages in this cause for a breach of the contract sued on, they must prove to the satisfaction of the jury, that after they were notified by the plaintiff (Green) of his having the hemp stored as aforesaid, they tendered to the plaintiff the full amount due to Green, as stipulated in the contract, to be paid when the same was delivered." The court gave the instruction number 3, to which defendants excepted, and refused the other instructions, to which refusal plaintiff excepted.

Defendants asked the following instructions: "1. The plaintiff had no right to demand of the defendants that they should pay him any money *before* he delivered them the hemp as called for in the contract; and if he refused up to the 13th of November, 1852, to deliver the balance of the hemp due, because defendants would not first pay him the one half of the contract price thereof, then such refusal was on his part a violation of the contract. 2. If the jury believe from the evidence that from the 10th to the 13th of November, 1852, the defendants were willing and able to receive from the plaintiff all the hemp then due on the contract, and pay him for the same, but that the plaintiff refused to deliver the said hemp until the same was paid for by defendants, and so did not deliver the same, then such failure to deliver was on the part of the plaintiff a violation of his contract. 3. It is not necessary that the defendants should have made to the plaintiff an *actual* tender of the cash payment on the hemp stipulated for in the contract. It is sufficient, if it appear from the evidence in the cause, that the defendants were ready and willing to receive the hemp contracted for, and pay for it according to the terms of the sale, and that plaintiff had notice of such readi-

ness and willingness ; and, if it so appears from the evidence, and that plaintiff was thereupon requested to deliver the said hemp, and neglected or refused to do so, then the jury should consider that the plaintiff broke the contract between him and defendants given in evidence, and give them such an amount of damage as has been the direct result of such breach of contract. 4. If the jury believe from the evidence in the cause, that the defendants were ready and willing to receive and pay, according to contract, for hemp which remained undelivered by plaintiff after the 27,902 pounds were delivered to defendants, and that plaintiff had notice that defendants were so ready and willing, but refused to deliver said hemp upon the ground that the defendants would not pay the deferred payment, or give a negotiable note therefor, when delivery should be made, then the plaintiff has violated his contract, and the defendants are entitled to have allowed to them the difference between the price stipulated to be paid for said hemp and the price thereof in Hannibal at the time the same should have been delivered, according to the terms of the contract. 5. If the jury believe from the evidence and under the instructions given them by the court, that the plaintiff failed to deliver the hemp to defendants, as required by the contract, and so broke the contract, then the plaintiff can not in this action recover any thing from defendants for or on account of the 27,902 pounds of hemp which he delivered to defendants on the 1st of October, 1852, and the verdict must be for defendants. 6. If the jury should find that the plaintiff has violated his contract by failing to deliver the hemp thereby required, but that the defendants have in no way violated or failed to perform their part of the contract, then the jury may find for the defendants such damages as they sustained by means of the plaintiff's failure to perform his part of the contract, and the measure of such damages is the difference between the contract price of all hemp the plaintiff neglected under and by the terms of the contract to deliver to defendants, and the market value of such hemp in Hannibal

at the time the same should have been delivered to defendants by plaintiff."

The court gave instructions numbered 1, 2, 3, 4 and 6, to which plaintiff excepted, and refused the one numbered 5, to which refusal defendants excepted.

The jury gave a verdict for the plaintiff for \$128 75, and a motion for a new trial, made by defendants, having been overruled, defendants appealed.

Porter and Richmond, for appellants. 1. The plaintiff was not entitled to be allowed any thing for his part compliance with the contract, the failure to deliver the residue of the fifty tons of hemp (over and above the 27,902 pounds, delivered and paid for, so far as required by the contract) not being excused by any default or failure of the defendants in the premises. It is insisted, in view of the terms and stipulations of the contract in issue, that the defendants have not waived its entirety, and that, being a special contract, plaintiff must have shown a compliance on his part before he could recover any thing. (12 J. R. 94.) 2. The evidence offered by defendants to show that by the custom and usage of trade, invariable and uniform, "the ton of hemp" meant 2240 pounds avoirdupois, and not 2000 pounds, as plaintiff contends, should have been permitted to go to the jury. Also, the evidence offered on the same side tended to show that the parties both understood the contract and originally intended to carry it into effect, according to said usage and custom, should have been admitted. And for the like reason the third instruction asked by plaintiff should have been refused. (1 Greenl. Ev. § 292, 293, 294, 295, and note 1; *Soutier v. Kellerman*, 18 Mo. 509.) 3. The stipulations of the parties in the written contract sued on, were mutual and dependent. No actual tender of the purchase price, therefore, was requisite on behalf of the defendants, before plaintiff was bound to deliver the hemp sold, and promised to be delivered at a place designated in the contract. It was enough that defendant showed (as he did) that they were ready, willing and able to pay according to the said contract. The plaintiff's in-

structions on this point were rightly refused. (1 Chitty's Pl. 356, 6th Am. ed., and authorities cited; Labeaume v. Hill & McKeese, 1 Mo. 42.)

J. O. Broadhead, for respondent. The only questions properly presented by the record are those arising out of the 3d instruction given for plaintiff, and the 5th instruction asked by the defendant, and refused by the court. 1. Plaintiff contends that the word ton, as used in the contract sued upon, means 2000 pounds avoirdupois. (See R. C. 1845, p. 1077,) and that the court was right in excluding all evidence tending to show that, according to mercantile usage, the ton consists of 2240 pounds. The appropriate office of a usage is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts, arising from implications and presumptions. (2 Sumn. R. 569.) No usage can be sustained in opposition either to the general principles or the positive enactments of the law. (Chitty on Cont. 82, and note; Smith's Mercantile Law, 29; 10 Mass. 29.) 2. The court was right in refusing the 5th instruction asked by defendants. The contract is not entire, but is divisible. But even if it were an entire contract, the defendants themselves have destroyed its entirety by accepting part performance, receiving the hemp, and retaining the benefit of it, and must pay for what they have received. (Chitty on Cont. 737; id. 446; 18 Pickering, 555.)

RYLAND, Judge, delivered the opinion of the court.

The questions in this case involve the proper construction of the contract, and also the meaning, as therein used, of the word "ton," under the statute. We have no doubt but that, under the contract and proof made in this case, the plaintiff is entitled to have pay for the hemp delivered, and received by the defendant, according to its value; not according to the contract price. The contract was broken, not fulfilled; and, although the plaintiff delivered and the defendant received hemp,

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yet the price agreed upon in the contract is not to govern in estimating its value at the time of its delivery and acceptance, but the real value of the article delivered and received is to be the criterion. Under this view of the law, then, the third instruction given by the court for the plaintiff, fixing the contract price as the value of the hemp, is erroneous; but this error does not prejudice the defendant in this case, for the proof shows, beyond doubt, that this contract price was less than the real value of the hemp; so the defendants have been benefited, not injured by this error, and can not complain thereof. Again, although this third instruction given for the plaintiff is incorrect, yet its error is rendered innoxious by the 6th instruction given for the defendant. There was but one instruction given for the plaintiff—the third—as set forth in the statement of the case, and but one refused for the defendants—the 5th—as mentioned in the statement.

It was competent for the defendants to set up by way of defence the breach of this contract on the part of plaintiff, and the rule for assessing the damages is well laid down in the 6th instruction given by the court for the defendants. There is no error, then, in these instructions upon this view of the case; and had this been the whole dispute between these parties, we, in all probability, should have never seen this case.

But there is another cause of complaint, and, we presume, the chief one; it is the meaning of the word "ton," as given by the court to the jury. The court informed the jury that, under our statute law, a ton of hemp meant 2000 pounds avoirdupois, and not 2240 pounds. On this point, too, the law is for the plaintiff, and was properly laid before the jury. In February, 1841, the legislature declared, by express statute, that "hereafter, when sales of hemp shall be made, the delivery of one hundred pounds avoirdupois weight shall be considered as the delivery of one hundred weight, any custom or usage to the contrary notwithstanding." (Sess. Acts, 1841, p. 86.) In 1845, (R. C. p. 1077,) the legislature again say: "The hundred weight shall consist of

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one hundred pounds avoirdupois, and twenty such hundreds shall constitute a 'ton.'” Here is the statute law of the land since 1841, and shall it be proved away by custom? The law-makers struck at this custom, this usage, and by law abolished it. Now when parties make contracts about hemp, they can easily agree to pay or to take so much money for so many pounds of hemp; but if the bargain be only by the “ton,” then the law says what the “ton” is, and no proof will be admitted about custom or usage or understanding—the contract can be proved, and when proved, if there appear a buying and selling by the hundred weight or by the ton, the law fixes a meaning to these terms; and when the law is appealed to for the remedy, it applies its own meaning. Let the judgment therefore be affirmed; the other judges concurring.

MORGAN, Defendant in Error, v. BOWMAN, Plaintiff in Error.

1. Where one employs a person, carrying on a distinct trade or calling, to perform certain work for him, the employee being independent of the control of the employer, the latter is not responsible for any injury to third persons caused by the negligence of the employee or his workmen.
2. Where, however, the one employed to superintend the work to be done, is subject to the control of his principal, and is paid for his services by day wages, the principal is responsible for injuries to third persons caused by such employee or his servants.
3. *Quere*, as to the soundness of the doctrine laid down in *Wood v. Steamboat Fleetwood*, (19 Mo. 529,) that an allegation of the value of property claimed by plaintiff, or alleged to have been destroyed, &c., by defendant, is not admitted if not denied.

Error to St. Louis Circuit Court.

In this suit, originally brought by Morgan against Bowman and one Greer, plaintiff sought to recover compensation for injuries sustained by him through the alleged fault of defendants, in carelessly and negligently causing certain goods belong-

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ing to plaintiff to be destroyed by fire when stored in a warehouse belonging to defendant (Bowman). The alleged negligence consisted in the careless management of a fire on the roof of said warehouse, used in boiling tar, pitch and other materials; the defendant (Bowman) having employed said Grier to superintend the placing of a *composition* roof on said warehouse. The evidence, showing the relation that Grier sustained to Bowman, is sufficiently set forth in the opinion of the court. The suit was dismissed as to Greer.

The petition contained the allegation, that on, &c., plaintiff "was the owner of divers goods and chattels of great value, to-wit, forty-five packages of merchandise of great value, to-wit, of the value of four thousand five hundred and ninety dollars," &c. There was no denial in the answer of this allegation; nor was there any evidence given on the trial of the value of the property destroyed.

It is not necessary to set forth the evidence given on the trial, as the only question raised upon that evidence was as to the responsibility of defendant (Bowman) for injuries caused by the negligence and carelessness of Greer.

The questions of law discussed in this court arise upon the following instruction given on the motion of plaintiff: "It being admitted by the pleadings that plaintiff was the owner of goods of the value of \$4590, which were stored in a house on Broadway; that defendant (Bowman) undertook to repair the roof thereon, and employed and retained a person in that behalf, and such person engaged in said work; that while the same was progressing, fire and combustible material were used, by the person so employed by Bowman, near the roof of said house, the same not being fire-proof; that there was about and upon said house a large quantity of such combustible material at the time of using said fire, and the same was communicated to said material, and thereby said house and plaintiff's goods were consumed; if the jury find that one Greer was the person so employed, and was by such employment to superintend said work, and to be paid by said Bowman by the day

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therefor; that said Greer, at the time of the burning said house and goods was so employed by the day, and was so superintending said work, and was therein guilty of gross negligence or unskillfulness or recklessness, and by means thereof said house and goods were burnt and destroyed, the jury will find for plaintiff the value of said goods, with interest thereon from the commencement of this suit."

There were certain instructions asked by defendant, and refused by the court, which it is unnecessary to set forth.

The jury found for plaintiff, and assessed his damages at \$4590.

M. L. Gray, for plaintiff in error. The law is well settled that where one does work for another, as a contractor, the employer is not responsible for the acts of the contractor or those acting under him. Also, that where an injury is done by a person exercising an independent employment, the person employing him is not responsible. (Parsons on Cont. 86; Barry v. City of St. Louis, 17 Mo. 121; Milligan v. Wedge, 12 Adol. & Ellis, 737-40; Allen v. Haywood, 53 Eng. C. L. R. 959; Quarman v. Burnett, 5 Mees. & Wels. 499; Rafron v. Cubit, 9 id. 710; Redie & Hobbitt v. Lond. Railway Co. 4 Exch. 244; Knight v. Fox *et al.*, 1 Eng. L. & Eq. R. 480.) 1. Greer was a contractor under defendant, and not his servant in any such sense as to make defendant liable for his acts. The true test of the existence of master and servant is the right and power of the employer to direct and control the employee. (Parsons on Cont. 86, and authorities above cited.) No such right was reserved to defendant in the contract between him and Greer, nor was any such control in fact exercised by defendant. The mere mode of payment is not and can not be the criterion or test by which to determine the relation of defendant to Greer. The employment of Greer at day wages will not make defendant liable, unless by the contract defendant reserved to himself the right of controlling or directing the work, or unless in point of fact the defendant did direct or control the work. (Parsons on Cont. 87, 93.) 2. Whether

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Greer was a contractor under defendant or his servant, was a question of fact that should have been submitted to the jury to find on the evidence. (Parsons on Cont. 92; 1 Moody & Robinson, 494.) The instruction given by the court took this question from the jury, and assumed that the employment of Greer, at daily wages, made him the servant of defendant, so as to make defendant liable for Greer's acts and the acts of those he employed, without regard to the vital and essential fact whether defendant was to exercise or did exercise any control over Greer or those under him. 3. If Greer was not a contractor under defendant in such a sense as to exonerate him (defendant) from liability on account of Greer's carelessness or the carelessness of those employed by him, yet Greer, in doing the work, was in the exercise of an independent and distinct calling or employment that relieved defendant from all liability for his acts. (Parsons on Cont. 89, note *b.*; 12 Adolph. & Ellis, 40 C. L. R. 737; Barry v. City of St. Louis, 17 Mo. 121; De Forest v. Wright, 2 Mich. 368.)

Glover & Richardson, Shepley and H. M. Jones, for defendant in error. This case turns mainly upon the instruction given for the plaintiff in the court below; for, if there is no error in that instruction, and it left the question of liability of the defendant to be fairly passed upon by the jury, there is no ground for reversal, although some one of the instructions asked for by the defendant might, without legal impropriety, have been given. 1. It was not incorrect to rule, that the allegation of value in plaintiff's petition not being denied, was admitted. The decision of this question turns upon the meaning to be given to the term "material," in the 12th section of article 7 of the code, which provides that "every *material* allegation in the petition, not specifically controverted as heretofore required, &c., shall, for the purposes of the action, be taken as true." By section 7, art. 6, it is provided that "the answer of the defendant shall contain, in respect to each allegation of the petition controverted by the defendant, a specific denial thereof, or any knowledge thereof sufficient to form a belief."

Under the old system of pleading, no *issue* was material unless it was decisive of the whole case. No *issue* could be taken upon allegations of value, in the common actions of *assumpsit*, *trover*, &c. The reason was, that the party denying the alleged value had no right, by "traversing such allegations by a formal traverse, to compel the plaintiff to prove more than he would be bound to prove, if the defendant had pleaded the general issue only," &c. (3 Saund. 207 *a.*) An allegation of some value was necessary, and in that sense it was then a *material* allegation; but of course it need not have been proved as alleged. Questions of values, amount of damages, &c., were really and truly *issues* before the jury, although not such, in strict legal language, upon the face of the pleadings. The new system of pleadings, established by the code, was designed to effect a fundamental change. The great object of this change was, as far as possible, to reduce the number of *issues*, so as to disencumber the *causes* to be submitted to the jurors for decision, by obtaining an admission of undisputed facts. In numerous instances, the value of goods delivered, or the items of an account, property conveyed, &c., would be well known to and peculiarly within the knowledge of the defendant; and unless he (the defendant) is disposed to put such value *in issue* by denial, there is not and there can be no reason why this failure to deny should not be taken as an admission. Why confine the meaning of the term *material allegation* to its meaning under the old system of pleading? So far as the question, what facts or allegations should be regarded as admitted is concerned, there seems to be no valid distinction between those allegations which go to the ground of the action, and those which go merely to the amount to be recovered. It is not contended that the mere claim to so much damages contained in the *ad damnum* clause, should be regarded as admitted unless denied. The prayer for relief is not a matter of allegation at all. The reasons are certainly very strong for holding that every allegation in a petition, not denied in the answer, is admitted, unless such allegation be *immaterial* in such

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a sense that the defendant is entitled to have it stricken out on motion. This would furnish us with a *good test* by which to determine whether an allegation is or is not material in the sense of the code. It can not, of course, be pretended that an allegation of value, such as that assumed to be material in the instruction we are now considering, would be stricken out on motion. Although there are some dicta in New York, in construction of a similar (the same, indeed) provision in the New York code, intimating that the rule is, as it will undoubtedly be contended by the opposite counsel to be, in this state, yet the only decision that has been made upon the point is directly in favor of the view now contended for by defendant in error's counsel. (See *Archer v. Baudinet*, 1 Code R., N. S.) This was an action to recover possession of personal property, and for damage for detention. Value of the property was alleged in the petition (and the allegation was not denied) to be fifty dollars. Woodruff, J., said: "For the purposes of this case, therefore, that sum (\$50) is to be taken as the value of the property, and no other value could, with propriety, be adopted even by the jury." Perhaps some fancied distinction may be attempted to be set up between this case and the present one, on the ground that it was required by the code that the petition, &c., for the possession of personal property, &c., must contain a statement of the value of the property claimed, &c. To this it is answered that an *allegation of some value* must be made, in cases like the present, or the court would not consider a party plaintiff entitled to set in motion the machinery of the law. The party being, then, compelled to state some value, must, upon his oath, state the true value. We are aware that in a case lately decided, this court has intimated an opinion opposed to the doctrine we are now contending for. (See *Wood v. Steamboat Fleetwood*, 19 Mo. 529.) 2. The ruling of the court, in the remaining part of the instruction we are considering, is correct. I. The general rule is, that a principal or employer is liable for all the tortious acts of his agent, employee, or servant, done in course of the agent's or

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servant's employment. This rule is generally stated thus: that the principal is liable, provided the relation of master and servant exists. This relation of *master and servant* exists in every case of agency unless the right of control or direction is taken away, so that any interference on the part of the principal would be a breach of a contract between the parties. II. The exception to the above rule is, that of one who engages by contract for the performance of work or business, and who, in the performance of that work, is engaged in a *distinct and independent calling*. III. The *calling or business* of the employee, in order to be *distinct and independent* in such a sense that the employer would not be liable for the tortious acts of the employee, except where those acts were specially authorized, must be, 1st. A separate and distinct calling or profession peculiar to those who engage in it; as that of a builder, brick-maker, carpenter, &c. (Milligan v. Wedge, 12 Ad. & El. 734-40; Laugher v. Pointer, 5 B. & C. 555.) 2d. It is necessary that the employee be employed in the performance of the work as contractor, i. e., that he take upon himself its performance, according to stipulations agreed upon, he not receiving mere wages for his services, or a salary, but being employed as a *job contractor*. (Martin v. Temperly, 42 B. 298, 312; Knight v. Fox, 1 L. & Eq. 474; Blake v. Ferris, 1 Selden, 62; Allen v. Hayward, 7 Q. B. 974.) 3d. The contract between the employer and the employee must be such that any interference with or exercise of control over the performance of the work, &c., would be a breach of such contract. (Allen v. Hayward, 7 Q. B. 974.) There may be reserved to the principal a right to inspect work done, or to dismiss incompetent workmen, or to suspend the performance of work. This alone would not make the principal liable, &c., provided there was no right under the contract to assume the general superintendence and control. (Reedie v. Railway Co. 4 Exch. 244, 258, per Rolfe, B.; Barry v. City of St. Louis, 17 Mo. 121.) In no case has any principal escaped liability for the acts of his employee, except in case where such employee

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was a job contractor, in the exercise of a distinct calling. And the payment of a person for his services, by paying so much per day, constitutes him merely an agent for doing the thing agreed to be done. It rests upon the defendant to show that Bowman, the defendant, had no right to control the performance of the work to be done by Greer. The proof shows that Bowman at first applied to Greer for estimates of the cost of repairing the roof of the row of buildings burned; that Greer made out such estimates; that Bowman, believing that the work could be done cheaper by doing it himself, hired Greer by *the day* to superintend the repairing, &c.; that the materials were purchased and paid for by Bowman, besides showing that Bowman was privy to and authorized the boiling of the composition upon the roof. The plaintiff's instruction seizes hold of the fact, which is undisputed and uncontroverted, that Greer was employed by the day to superintend the repairing, &c., and founds upon it, together with facts admitted by the pleadings, the legal conclusion that the relation of master and servant existed, so that Bowman was liable for the acts of Greer. The fact that Greer was employed at day wages, is entirely inconsistent with his being a *contractor* by the job.

LEONARD, Judge, delivered the opinion of the court.

The questions discussed here, in the application of the rule, "*respondeat superior*," is, whether the defendant, the owner of the building for whom the work was being done, was responsible as master; or whether Greer, whom the defendant had employed to have the work done for him, was alone liable, on the ground that the relation of superior and subordinate, within the meaning of the rule, did not exist between them. It was admitted in the answer that the defendant was the owner of the building; that he had directed the roof to be repaired, and had engaged a person to have the work done, and the proof was, that the defendant declined employing Greer to do it *by the job*, on account of the price he asked, and employed him

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by the day, at an agreed price ; that Greer engaged the hands, &c., (the defendant paying them) and superintended the work as it was being done. Upon this proof, the court substantially instructed the jury, that if Greer was the person employed by the defendant, and by his employment was to superintend the work and be paid therefor by the day, the defendant was liable for the damages to the plaintiff that resulted from Greer's negligence in the performance of the work. In this we concur, and of course the judgment must be affirmed.

The maxim to which we have referred is well settled, but the difficulty is in applying it to the circumstances of each particular case ; in other words, in determining what facts establish the relation of superior and subordinate, so as to subject the parties to the rule.

In the earlier English cases, (*Bush v. Steinman*, 1 Bos. & Pul. 404, and *Sly v. Edgly*, 6 Esp. 6,) it was declared, in respect to injuries occasioned by the negligent use of *real property*, that the owners were liable, whether the injury complained of were the acts of their own servants, or the acts of independent contractors, employed by the job. Accordingly, in *Bush v. Steinman*, where the owner of a house had employed a surveyor to do some work upon it, and there were several sub-contracts, and one of the workmen of the person last employed had put some lime in the road, in consequence of which the plaintiff's carriage was overturned, it was held that the owner of the house was liable, though the person who occasioned the injury was not his immediate servant. This liability was not supposed to arise out of the relation to which we have been referring, but proceeded, as is stated by Justice Little-dale, in his celebrated opinion in the case of *Laugher v. Pointer*, (5 Barn. & Cres. 560,) upon a supposed rule of law that "in all cases where a man is in possession of fixed property, he must take care that the property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants, the injuries done upon land or buildings are in

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the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by law to himself, and he should take care not to bring persons there who do mischief to others." Subsequently, however, in *Milligan v. Wedge*, (12 Ad. & Ell. 737,) and in *Allen v. Hayward*, (7 Ad. & Ellis, N. S., 960,) this doctrine was questioned and finally overruled. In *Reedie v. N. W. R. Co.* (4 Exch. 250,) where the workmen of the contractors, to whom the Railway Company had let the work, reserving to themselves the power of dismissing any of the workmen for incompetency, in building a bridge, had caused the death of a person by negligently allowing a stone to fall, it was held, in an action against the company by the administrator of the deceased, that they were not liable, the court declaring that, after full consideration, they had come to the conclusion that there was no distinction, in point of law, in cases like that then under consideration, between fixed property and ordinary movable chattels, *unless, perhaps, in cases where the act complained of was such as to amount to a nuisance.* The doctrine of the early English cases, although recognized in Massachusetts, in *Inhabitants of Lowell v. Boston & Lowell R. R. Co.* (23 Pick. 24,) and in *Earle v. Hall*, (2 Metc. 353,) has been questioned in New York, (*Fish v. Dodge*, 4 Denio, 411,) and overruled in this state, in *Barry v. City of St. Louis* (17 Mo. 121.) It is not material in the present case, however, as the plaintiff's right of recovery was not put in the court below, nor is it put here, upon any principle peculiar to real property, but was made to turn exclusively upon the question whether the relation of superior and subordinate subsisted between the defendant and Greer, or whether the putting the roof upon the house was done by him as job work, under a contract with the owner for that purpose; in other words, whether Greer was the defendant's servant, in respect to this work, or an independent job contractor. It has been justly remarked that questions of liability, for the negligence of a servant, assumed one of two

forms—either, it being clear that the wrongdoer is somebody's servant, the question is, whether he is the defendant's; or, the doubt is, whether he acted in his own behalf, being no one's servant in the particular affair in which the negligence is shown, and these questions have been much discussed in the courts of justice; and although the present is not one of any great nicety, yet we may be allowed to refer for a moment to the leading cases upon the subject. In *Laugher v. Pointer*, to which we have already referred, where the owner of a coach had engaged of a livery stable keeper horses and a driver for the day, the question was, whether the livery stable keeper or the person who hired the horses and driver was responsible for an injury occasioned by the negligent conduct of the driver. The judges before whom the case was argued, gave separate and elaborate opinions, and exhausted—Judge Story tells us—the whole prior learning on the subject; but the point was left unsettled, as not only the court of queen's bench, but the twelve judges differed upon it. Afterwards, in 1840, the question arose again in the case of *Quarman v. Burnett*, (6 M. & W. 499,) in the court of exchequer, where it was decided that the hirer was not liable; and Parke, Baron, in delivering the opinion of the court, said: "Upon the principle that *qui facit per alium, facit per se*, the master is responsible for the acts of his servants, and that person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from his knowledge or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey."

The word servant ordinarily indicates a person hired for wages, to work as the employer may direct, and the control which thus exists in the superior over the subordinate seems to be the principle referred to in the above extract, limiting and defining the cases in which the rule to which we have been referring is applicable. And it is accordingly held, that where one employs a person carrying on a distinct trade or calling, to perform certain work for him, independent of the control of

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the employer, the latter is not responsible for any injury caused by the negligence of that person or his workmen. There are many cases in the books in which this rule has been applied, and it is upon this principle that the defendant places his claim of irresponsibility for the damage here complained of. A butcher bought a bullock in Smithfield market, and employed a licensed drover to drive it home, and the driver employed a boy, through whose negligence the bullock injured the plaintiff's property, and it was held that the butcher was not liable, as the drover exercised a distinct calling, and the boy, who did the mischief, was his servant, not the servant of the butcher. (*Milligan v. Wedge*, 12 A. & E. 737.) A builder was employed to make certain alterations in a club house, to do which he made a sub-contract with a gas-fitter, through the negligence of whom the gas exploded and injured the plaintiff, and the builder was excused from liability on the ground that the relation of master and servant did not exist between him and the party causing the injury. (*Rapson v. Cubitt*, 9 M. & W. 710.) A brig which was towed at the stern of a steamboat, employed in the business of towing vessels in the Mississippi, below New Orleans, was, by the negligence of the master and of the steamboat, over whom those in charge of the brig had no control, brought in collision with a schooner lying at anchor in the river, and the owners of the brig were held not liable for the damage occasioned by the collision, for the reason that the master and crew of the steamboat were not the servants of the owner of the brig—that they were not appointed by him, and did not receive their wages from him, and were not subject to his order or control. (*Spraul v. Hemingway*, 14 Pick. 71.) In all these cases, the employer had parted with the whole control over the work and the workmen; but here, there is nothing of the kind. Greer was not employed as a job man to put the roof upon the house, the defendant divesting himself, by engagement, of all right of control; and there is no proof to that effect. He was employed as the defendant's agent to have the work done by hands to be employed in

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behalf of the defendant for that purpose, and to superintend the execution of it. His engagement was by the day, and he was paid accordingly. He was bound to receive his orders, in respect to the work, from the defendant, and to obey them, and was subject to be dismissed at any moment for misconduct. It is difficult to imagine a clearer case upon the proof of the relation of superior and subordinate, within the meaning of the maxim. Without, however, any reference to the sufficiency of the proof, which was a matter for the jury, it is sufficient, as a matter of law, to create that relation, that Greer, in the language of the instruction, was engaged to superintend for the defendant the putting on of the roof, and to be paid therefor by the day. Under these circumstances, he can not be allowed to escape from his own just responsibility to others, because he omitted, in point of fact, to exercise the control over his agent that he undoubtedly possessed. The latter, however, may be liable to the *former* for the damage that has resulted; but that question can not be decided here.

The judgment is affirmed.

KING OF PRUSSIA, Plaintiff in Error, v. KUEPPER'S ADMINISTRATOR, Defendant in Error.

1. A foreign sovereign may maintain an action against a citizen of this state in the courts of this state.
2. By a law of the kingdom of Prussia, the king, upon refunding to the proper owners, under a law of the kingdom, moneys stolen or embezzled by an officer of the post office department, while the same were passing through said department, became subrogated to the rights of said owners against the embezzling officer; *held*, that in case such embezzling officer should abscond from Prussia and come to this state, the king of Prussia may maintain an action against him in the courts of this state.

Error to St. Louis Circuit Court.

This was a suit brought by Frederick William IV, king of Prussia, against Felix Coste, administrator of Frederick Wil-

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liam Kuepper, deceased. The petition is as follows: "The plaintiff states that he is absolute monarch of the kingdom of Prussia, and as king thereof is the sole government of that country; that he is unrestrained by any constitution or law, and that his will, expressed in due form, is the only law of that country, and is the only legal power there known to exist as law.

"The plaintiff further states that by the law of Prussia any money or its equivalent sent or transmitted through the royal post department of that country, or received to be so transmitted or sent by any duly authorized officer of said department, if lost, stolen, or embezzled, is to be refunded to the proper owners thereof by the plaintiff, through his officers and agents, and that such was the law on and long before the 10th April, 1849. The plaintiff further states that the said Kuepper was on and for a long time before the 10th April, 1849, the plaintiff's servant and post officer at Wermelskirchen, in the kingdom of Prussia, and that while said Kuepper was such post officer, he received, in his official capacity, large sums of money, or its equivalent, portions of which money, or its equivalent, were transmitted through said department, and received by said Kuepper as aforesaid, to be delivered by him to the true owners thereof at Wermelskirchen, and portions of which were deposited with him as aforesaid by persons at Wermelskirchen, to be transmitted by him through said post department to persons at various places; and the plaintiff, if required, is willing and ready to give a statement of each item, by and to whom sent, when, &c. The whole amount of the moneys or its equivalent, so received by said Kuepper, was seven thousand four hundred German dollars, or thereabout, which, in the currency of the United States, are equal to sixty-nine cents each.

"The plaintiff further says that on or about the 10th April, 1849, said Kuepper did abscond with all said sums of money, and did embezzle and convert the same to his own use, and secretly fled and escaped from the said kingdom and came to St. Louis, Missouri, where he died in the summer of 1849, and

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letters of administration on his estate were duly granted to the defendant (Coste) by the St. Louis probate court, on the thirty-first day of July, 1849. The plaintiff further states that he has, according to the law and custom of his said kingdom, duly refunded and paid to the various and proper owners thereof the various sums of money or its equivalent, stolen and embezzled from them respectively by said Kuepper as aforesaid, and that he therefore has, according to said law and custom, and by justice and right ought to and has a just and legal demand against the defendant, for the sums of money by him and his officers so refunded and paid.

"The plaintiff says, therefore, that the defendant justly owes him said sum of money, and he estimates his damages for said money and interest at the sum of seven thousand dollars, for which last sum he asks judgment against the defendant."

The defendant demurred to this petition, and assigned the following reasons: That the petition does not state facts sufficient to constitute a cause of action; that it does not state any legal privity between the plaintiff and defendant; that it does not state any legal right in the plaintiff to recover the said sums of money alleged to have been embezzled from certain persons living in the kingdom of Prussia; that it does not state any legal right in the plaintiff to recover for the money embezzled by the said Kuepper, which, at the time of the embezzlement, belonged to other persons than the plaintiff; that the plaintiff was not under any legal obligation to pay to the persons from whom Kuepper embezzled property as alleged, and the payment of such losses was merely voluntary, and that the plaintiff has no legal capacity to sue in this court; wherefore the defendant prayed judgment and for costs.

The court below sustained the demurrer, and gave judgment for the defendant, to which plaintiff duly excepted. Plaintiff brings the case here by writ of error.

Gibson, for plaintiff in error, cited in support of the petition, the following authorities: *Sturges v. Crowningshield*, 4 Wheat. 193; 1 Kent Comm. 395; *Delafield v. State of Illi-*

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nois, 2 Hill, 159; 26 Wend. 192; State of Indiana v. Woram, 6 Hill, 35; 5 Cranch, 303; Cherokee Nation v. Georgia, 5 Peters,; King of Spain v. Oliver, 2 Wash. C. C. 432; King of Spain v. Hullet & Co., 1 Dow & Clark, 174; 1 Clark & Fin. 133; Columbian Government v. Rothchilds, 1 Sim. 94; Hullet v. King of Spain, 2 Bligh's N. R. 31; Nabob of Arcot v. East India Co. 2 Brown's Ch. 180; Duke of Brunswick v. King of Hanover, 1 Chit. Eq. Dig. 144; Rothchilds v. Queen of Portugal, 1 id. 115.

B. A. Hill, with whom was *Edward Bates*, for defendant in error. 1. Plaintiff sues defendant upon the hypothesis that a larceny by Kuepper, the intestate, while postmaster, subrogates the plaintiff to the right of action, which the parties losing the money would have had at common law against the thief who stole the property. At common law, each party from whom property was stolen had an action of trover or trespass against the thief. The action here is in the nature of an assumpsit for the moneys which the king voluntarily paid in the exercise of his will as absolute monarch, to the persons from whom Kuepper stole the various sums of money. It is not pretended that there is any legal privity between these parties known to our law; but the will of the king is averred to be law in Prussia and to give a right of action here. No action can be maintained in our courts except upon a legal liability recognized as such by our laws. There must be a legal privity to raise the assumpsit or demand averred in the petition. The legal cause of action appears to be in various other persons than the king, and they are the only persons who could sue Kuepper in our courts. 2. The king and Kuepper bear the relation of master and servant, and the servant commits a tort wilfully upon the property of certain persons. The master, by our law, is not liable for the wilful *tort* of his servants; the persons who lost their money, by the larceny of Kuepper, could not have maintained an action against the king, his master, therefor. If the larceny committed by Kuepper, in the employment of the king, was an injury to the king as a person or as a corpora-

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tion, an action might be sustained for such injury; but as, upon a money demand in *assumpsit*, the gravamen of such action would be the misconduct of the servant in the employment specified and the *consequential* injury therefrom, the king, in such case, would sue for the injury done to himself, not for the injuries Kuepper had done to other persons, as he has in this action. 3. By the payment of the moneys stolen by Kuepper to the parties from whom it was stolen, the king acquired no right of action against Kuepper at common law, and under our statute of 1849, it was necessary for a party to procure an assignment from the original party in interest before he brings suit. A voluntary payment, as in this case, gives no right of action. It follows necessarily from these premises that, under our laws, the king, as a person, has no right of action for the causes specified. 4. It is affirmed in the petition that the will of the King of Prussia is law there, and that by the exercise of his will, as *absolute monarch*, he assumed the payment of the moneys stolen by Kuepper, and therefore has become subrogated to the right of action existing in the various persons robbed; and the claim here is to recover, by virtue of his office as an *absolute monarch*, upon an obligation, that he has so exercised his will as to create a law under which the defendant is liable. Defendant denies the right of any party to recover upon such grounds. If the King of Prussia sues in a state court, *he must waive his sovereignty*, and claim in accordance with our laws and recover by virtue of some legal demand recognized as such in our jurisprudence. But the claim of the plaintiff is based upon his rights as an *absolute monarch*, not as a person; he does not *wave his sovereignty*, but asserts his right to recover by virtue of his sovereignty, and it is upon this ground *alone* that the recovery can be had. If the person holding the office of King of Prussia held a demand against any other person, or against a corporation, recognized by our laws as a legal demand, he could sue as a person in our courts. It is doubtful whether he could sue in the capacity of king as a corporation sole; but the authori-

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ties seem to authorize it in cases where he waives his sovereignty, and his right of recovery is recognized by our laws. But there is no case in which it has been decided that a foreign prince or potentate can recover in a state court upon a demand not recognized by our laws, by virtue of a right of sovereignty. A trial of such a cause would involve the examination and adjudication of and upon the sovereign powers of the foreign potentate, and the validity of the decrees of such potentate, as an absolute or restricted monarch, and the rights and privileges of such monarch as king of a foreign state, under treaties with the republic of the United States. These are questions that the constitution designed should be tried and determined in the federal courts of the republic. The state courts never had any jurisdiction of such cases or questions prior to the adoption of the constitution of the United States. (See Const. of U. S. art. 3, secs. 1, 2; 83d art. by Hamilton, in the Federalist; Martin v. Hunter, 1 Wheat. 304, 333; 1 Curtis' Commentaries, p. 156-7-8-9 and 127.) The King of Prussia, in suing in a court of the state of Missouri upon a demand arising out of the alleged sovereign right of one absolute monarch to create a legal liability, *by the exercise of his will*, has chosen a forum where such questions can not be tried. If by treaty or the laws of nations such a demand could be enforced, there is but *one forum* where the questions involved can be determined, and that forum is the federal court. If it were not so, there might be conflicting decisions in different states, upon questions of a national character. The cases relied upon by the plaintiff are not in point. They only apply to actions in which the king or foreign state, or one of the sister states, *waives the right of sovereignty*, and seeks to recover upon a demand recognized by our laws. (Delafield v. State of Illinois, 26 Wend. 210; same case in error, 2 Hill, N. Y., 161; State of Indiana v. Woram, 6 Hill, N. Y., 35; Columbian Government v. Rothschilds, 1 Simons, 52-3, reported in 2 vol. Eng. Cond. Ch. 52-3.) The case of Delafield v. The State of Illinois, (26 Wend. 212,) is an authority in favor of defendant. The

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distinction must be carefully observed between the jurisdiction of the court of king's bench in England, and the state courts of this republic. There is no resemblance between the powers of the high court of chancery in Great Britain and the court of king's bench, and our state courts. The former are national courts, competent to decide upon questions involving the construction of treaties, and the law of nations. The cases cited from the English books do not touch the question raised by the defence in this action. (See *Spanish Ambassadors v. Pountes*, 1 Roll. Rep.; same v. Jolliffe, Hobart, 78 and 113; same v. Gifford, Moore, 850; *Ogden v. Folliatt*, 3 Term Rep. 726; *Nabob of the Carnatie v. East India Co.* 1 Ves. jr. 371; S. C. 2 Ves. 56; see also *King of Spain v. Oliver*, 1 Peters, C. C. R. 276; Article No. 33 of Federalist; *King of Spain v. Machado*, 4 Russ. 238, reported 3d Eng. Cond. Ch. R. 643; see 1 Kent Comm. 315 and cases cited; id. 316 and 318.) The plaintiff claimed his right under the treaty between the United States and Prussia and the law of nations. The jurisdiction of the federal courts is therefore exclusive, and the judgment should be affirmed.

SCOTT, Judge, delivered the opinion of the court.

This case comes up on a demurrer, and raises the question whether a foreign sovereign can sue in our courts. It seems to be now well settled in England that a foreign sovereign can sue in her courts both at law and in equity. In the case of *Hullet & Co. v. The King of Spain*, Lord Redesdale said: "I have no doubt but a foreign sovereign may sue in this country, otherwise there would be a right without a remedy. He sues here on behalf of his subjects, and if foreign sovereigns were not allowed to do that, the refusal might be a cause of war. (1 Dow & Clark, 175; *The King of Spain v. Machado*, 3 Con. Eng. Chan. 645; 1 Clark & Finnelly, 333; *The Columbian Government v. Rothschilds*, 2 Con. Eng. Chan. 48.)

Kings have been allowed to sue in the United States. In the

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case of the King of Spain v. Oliver, (1 Pet. C. C. R. 276,) the suit was entertained without question as to the right of a foreign sovereign to sue. So the case of the Republic of Mexico v. Arrangois and others (11 How. Prac. Rep. 1) was entertained by the courts of New York. In our courts, a writ in the name of the state of Indiana was brought and passed through all of them, without any question as to the right to do so. (Tagart v. State of Indiana, 15 Mo. 209.)

If the subjects of foreign governments will contract obligations or affect themselves with liabilities to their kings or princes, and afterwards migrate to the United States, there is nothing in the nature of our institutions which shields them from their just responsibilities. While our government grants the rights and privileges of citizenship to all foreigners who are naturalized under our laws, there is neither policy nor justice in screening them from the civil liabilities which they have contracted with the government to which they were once subject. Our tribunals afford no assistance in the enforcement of the penal codes of foreign nations, nor would they aid despotic rulers, in the exercise of an arbitrary power, in making special and retrospective laws affecting foreigners residing here, who were once their subjects. But when laws have been made abroad, and debts have been contracted under those laws, there is no reason for refusing our assistance in their collection. Though foreign laws may be enacted by a power and in a way inconsistent with the spirit of our institutions, that is no reason why they should not be enforced against those who have incurred responsibilities in respect of them. Foreign nations have the same right to determine the form of government most conducive to their happiness that we have, and to deny the validity of their laws, because they have not been made in a manner conformable to our notions of government, would be to destroy all comity among nations and introduce endless wars and quarrels. The averments in the petition show that by the laws of Prussia, the defendant's intestate was indebted to his sovereign, and he should be made to answer for it.

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It was maintained that this suit should have been brought in the courts of the United States, as the constitution of the United States expressly provides "that the judicial power shall extend to all cases between a state or the citizens thereof, and foreign states, citizens or subjects."

The government of the United States being entrusted with the power of peace and war, it was necessary to invest it with authority to establish tribunals to which foreign states or subjects might resort for injuries sustained by the conduct of those residing within the limits of the United States. For the judgments of tribunals thus established, the United States would be responsible to foreign states. But if they, passing by the courts created by the general government for the redress of grievances they may have sustained at the hands of citizens of the United States, will litigate their rights in courts for whose conduct the United States are not responsible, if they should be dissatisfied with the measure of justice meted to them by the courts, they have no cause of complaint against the federal government. The ready answer to any remonstrances made on that score, would be that there should have been a resort to the tribunals established by the United States. The foreign prince has the right to resort to the courts of the general government; this is a privilege the constitution and laws secure to him; but he may renounce it like any other privilege, and litigate his rights in the state courts.

Whilst commentators on the constitution maintain that it is competent for congress to vest all of the judicial powers of the United States exclusively in tribunals of its own creation, it is nevertheless admitted that this has not been done, and that the state courts, in cases in which they had cognizance before the adoption of the federal constitution, may, concurrently with the courts of the United States, still entertain jurisdiction.

The state courts, undoubtedly, before the existence of the federal government, had cognizance of causes in which foreign states were plaintiffs. That jurisdiction remains, unless it has been taken away by the constitution and laws of the United

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States. The grant of judicial powers by the constitution, in some cases, is exclusive; in others, it is concurrent at the will of congress; that is, congress may make it exclusive or concurrent, as it seems best. In cases in which the state courts had cognizance before the adoption of the constitution of the United States, that jurisdiction remains unless it is taken away. Congress has conformed its action to this principle, and has suffered a portion of the judicial powers of the United States to be exercised by the state courts. (1 Kent, 398; Story's Comm. § 1784.) The jurisdiction, in cases of the character of that under consideration, has not been exclusively vested in the federal courts; hence the state courts may still exercise jurisdiction in all such cases.

With the concurrence of the other judges, the judgment will be reversed, and the cause remanded.

McKNIGHT, Appellant, v. CRINNION, Respondent.

1. In actions brought under the act of March 10, 1849, (sess. acts, 1849, p. 47,) before a justice of the peace for the recovery of personal property, the proceedings must be regulated and governed by article 8 of the practice act of 1849.

Appeal from St. Louis Law Commissioner's Court.

The facts sufficiently appear in the opinion of the court.

C. McClure, for appellant.

McBride, for respondent.

SCOTT, Judge, delivered the opinion of the court.

The act of March 10th, 1849, (Sess. Acts, 1849, p. 47,) gave justices of the peace jurisdiction in all actions for the recovery of personal property alleged to be wrongfully detained by any defendant; and further provided that actions in such cases should be conducted after the rules governing such actions in the Circuit Court. Now as this act took effect before

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the practice act of 1849 passed during the same session, which provided that it (except the 25th article) should not apply to proceedings or actions before justices of the peace, it is maintained that justices, in proceeding under the act of March 10th, above mentioned, must conform to the statute regulating the proceedings in actions of replevin in the code of 1845, in force at the date of the act of 10th March, and not to article 8 of the practice act of 1849, relating to the claim and delivery of personal property, inasmuch as the act is not applicable to justices' courts.

We do not concur in this view of the matter. The act of 1849 was designed to simplify proceedings at law. It abolished the action of replevin, and gave a new and ample procedure in its stead. Now, would it not be singular to make this this act a rule of conduct for the higher courts, and leave the old intricate proceeding for the lower courts? In declaring that justices should conform to the rules governing actions of replevin in the Circuit Courts, the legislature obviously intended the rules for the time being. That whatever rules prevailed in the Circuit Court, at the time of beginning the proceedings in the justices' courts, those rules should control the justices. It was not designed that the rule in the justices' courts should be different from that in the Circuit Court, but that as often as the rule was changed for the Circuit Courts, the justices should be governed by it. The judgment is reversed, and the cause remanded; the other judges concurring.

WOOD & WOOD, Respondents, v. STEAMBOAT FLEETWOOD,
Appellant.

1. Where a dray ticket, containing an acknowledgment of the receipt of goods to be transported, also a statement of the rate of freight thus—"30 cents per 100 lbs.," is signed by a clerk of a steamboat; *held*, in a suit against the boat, that such a dray ticket is not conclusive as to the rate of freight; that the words "30 cents per 100 lbs." may be shown to have been inserted by fraud, mistake or surprise, and consequently did not express the intention of the parties.

Appeal from St. Louis Court of Common Pleas.

This has heretefore been in this court, and is reported in 19 Mo. 529. The following instruction, to the giving of which the defendant excepted, was given to the jury by the court:

"6. If the rate of freight was inserted in a dray ticket, and said ticket was afterwards signed by the clerk of the defendant, then the defendant is bound by said contract, as to the freight on the articles named in said ticket, unless the defendant has shown to the satisfaction of the jury that said clerk had no authority to make said contract for the defendant, and that the plaintiffs knew that he had no such authority."

The other facts of the case sufficiently appear in the opinion of the court.

J. A. Kasson, for appellant.

Barrett, for respondents.

LEONARD, Judge, delivered the opinion of the court.

This suit was for the nondelivery of goods under an alleged contract of affreightment from Pittsburgh to St. Louis, at thirty cents per hundred, and the decision of the case turned upon the question whether or not thirty cents was the agreed rate. The boat insisting that no such agreement had been made, refused to deliver the goods, unless the customary rate was paid, which, it was insisted, exceeded the alleged rate; and the owners tendering what they said was the contract price, declined paying more, and brought this action. Upon the trial, the plaintiff gave in evidence two dray tickets, signed by the boat's clerks. In the first were found, immediately under the heading, "Packages and weights," the words, in pencil mark, "at 30 cents per 100 pounds," but which were omitted in the other. The tickets were printed blanks in book form, with two columns, headed with the words, "marks" and "packages and weights," and contained a printed acknowledgment of the receipt of goods by the boat, described under appropriate heads. They are used,

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it seems, to discharge the draymen and to charge the boat temporarily with the goods, until the formal bill of lading can be made out from them, and it is unusual to insert in them the rate of freight.

It was insisted in proof, on the part of the boat, that the pencilled words were not upon the paper when the clerks signed it, and if they were, that the fact was not brought to their attention, and escaped their observation. The instructions given and refused declare the ticket to be conclusive evidence of the rate of freight, and exclude all parol evidence that the words were inserted by fraud, mistake or surprise, and did not express the intention of the parties. We are not of that opinion, and therefore reverse the judgment, that the cause may be tried under the view of the law now taken. When, in order to render a contract obligatory, the law requires, or the parties themselves agree, that it shall be reduced to writing, there is no valid contract until the required instrument has been executed, and when it is executed, it becomes the exclusive evidence of the *whole contract*, and is not open to contradiction by parol evidence; and this rule results from the necessity of it, in order to execute the intention both the law-givers and the parties had in view in requiring the contract to be put in writing. And where, without any previous agreement to that effect, persons have entered into a written contract, in such terms as impart a perfect legal engagement, it is *conclusively presumed* that the whole contract is embraced in the writing, and the same rule, as to the exclusion of the parol evidence, applies as in the other cases. It would seem, then, to be an abuse instead of a just application of the rule, which is undoubtedly one of great practical wisdom, to apply it to the loose, temporary written admission of a single term to be inserted in a contract which parties are about to enter into. A written obligation, importing a perfect, complete transaction, while it stands, is the exclusive evidence of the terms of the bargain; but even such an instrument may be reformed by a direct proceeding for that purpose, when, by fraud or mistake, it fails to express the real

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contract of the parties. But certainly a bill in equity need not be resorted to in order to reform a written admission not imparting a complete legal engagement, and accordingly it was said by the court, in *Fuller v. Crittenden*, (9 Conn. 406,) "The true view of this subject seems to be, that such circumstances as would lead a court of equity to set aside a contract, such as fraud, mistake or surprise, may be shown at law to destroy the effect of a receipt;" and this principle was acted upon in *Brown v. Bennett*, (1 Camp. 394,) where a receipt obtained by fraud or misrepresentation was held to be a nullity; and in *Fairmaner v. Budd*, (7 Bing. 574,) where proof was received that the signer of the receipt was illiterate, and that the receipt was not drawn according to the authority. The doctrine of the New York courts, however, in relation to receipts, goes beyond this (*Southwick v. Hayden*, 7 Cow. 335); and it is laid down in 1 Greenl. Ev. § 305, that, "so far as the receipt goes, only to acknowledge payment or delivery, it is *prima facie* evidence of the fact, and not conclusive;" and we think this latter doctrine is applicable to this transaction, not only in reference to the fact of the receipt of the malt, but also as to the admission in pencilled words, "at 30 cents per cwt." The judgment is accordingly reversed, and the cause remanded.

BOGGS & KENNARD, Respondents, v. LYNCH AND OTHERS,
Appellants.

1. Where in a suit against a keeper of a livery stable to recover damages for injuries sustained in consequence of the negligent driving of a carriage of defendant by one of his servants, testimony was offered on the part of defendant to show that the general character of the driver was that of a prudent and careful driver; *held*, that such testimony was properly excluded.
2. On a motion for a new trial on the ground of newly discovered evidence, the affidavit of the party to the suit will not itself suffice; the affidavit of the new witness must be produced or its absence accounted for.

Appeal from St. Louis Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

Hill, Grover & Hill, for appellants.

I. Z. Smith, for respondents, cited 1 Tyler, 443; Cooke, 292; 3 A. K. Marsh. 104; 2 Nott & McC. 563; 2 Bay, 268; 4 Blackf. 307; 1 Green, 177; Grah. on New Trials, 467; 20 Mo. 425; 1 Caines, 24; 23 Verm. 244.

RYLAND, Judge, delivered the opinion of the court.

This suit was brought by plaintiffs to recover damages for the alleged trespass of a servant in the employ of defendants. The petition alleges that plaintiffs, being the owners of a box of looking-glasses, had employed a carman to transport them from the levee, in the city of St. Louis, to their store on Fourth street; that while they were in the act of unloading the box and had it partly out of the car, a negro servant, then in the employment and under the control and direction of defendants, and at the time engaged in driving a carriage and horses of defendants, carelessly and negligently drove the said carriage against the horses attached to the car in which was plaintiffs' glass, and thereby causing the horses attached to the car to start and the glass to be broken.

The answer admits that the servant was in the employment of defendants, but avers that he was under the direction of one Sublette, who had hired the horses, carriage and driver of defendants, and had direction of them at the time of the alleged accident.

At the trial, it appeared by the testimony of the plaintiffs' witnesses, that the horses of defendants came into collision with the horses and car in which the box of glasses was, causing the horses of the car to start, and the box of glasses to fall, and thereby become broken and the glasses destroyed. The value of the glasses was proved. The defendant then called the plaintiff (Kennard), whose testimony corroborated that of his own witness, the carman.

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The court instructed the jury that the plaintiffs could not recover if the servant wilfully did the wrong. The court also excluded the testimony offered by defendants, tending to show that the general character of the driver of defendants' carriage was that of a prudent, careful driver. The jury found their verdict for plaintiff, and judgment was rendered thereon.

The defendants moved for a new trial on account of the rejection of the evidence as to the driver's character, and on the ground of newly discovered evidence—a witness by whom he could prove that there was no collision, but that the carman's horses took fright themselves, when defendants' carriage started. But there was no affidavit of the newly discovered witness himself, accompanying the application for new trial on the defendants' affidavit. This motion for new trial was overruled, and the defendants bring the case here by appeal.

The court below very properly rejected the evidence of the general character of the driver, as to his prudence and carefulness. This character was not brought in controversy; it was wholly immaterial to the issue; the most careful and prudent character would not justify the act complained of, and without proof of the act, the most inattentive and careless character would not warrant the jury in finding the act done. The driver's character had nothing to do with the matter in controversy; there is nothing, therefore, in this point. There is equally as little in the point about being surprised by the testimony of Kennard. He had made affidavit to the facts set forth in his petition; and how afterwards, in giving his testimony, substantially stating the same matters, the defendants could be surprised is not easily perceived.

The third point also is against the defendants. Under the circumstances in evidence in this case, it is obvious that the newly discovered witness could be received in no other light than in giving cumulative evidence; the facts stated by defendant as those to which he will testify are on the same subject already passed on by the jury—the collision—the evidence on the plaintiffs' part is, that there was a collision; and by the defendants,

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that, from the tracks of the horses and carriage and car, there was probably no collision. But there is still another fatal objection to the motion for a new trial; there is no affidavit of the newly discovered witness himself, detailing what he will testify to; and without this, the court will not grant a new trial on newly discovered evidence alone; the affidavit of the party interested will not suffice itself; the affidavit of the new witness must be produced or its absence accounted for. (3 *Graham & Waterman on New Trials*, 1065.) A new trial will not be granted on account of newly discovered evidence, if the evidence is only material to impeach or contradict witnesses sworn on the former trial, nor where the evidence is merely cumulative. (*Fleming v. Hollingsback and Sweet*, executors of *Hollingsback*, 7 Barb. S. C. R. 276-2; *Denio*, 104; 10 Wend. 274; 1 *Tyler*, 441; 4 *Blackf.* 308; 20 *Mo.* 425; *Wells v. Sanger*, 21 *Mo.* 354.) The other judges concurring, the judgment below must be affirmed.

CHARLESS, Respondent, v. RANKIN, Appellant.

1. Although every proprietor of land has a right to the support of the soil of an adjacent lot, as a natural servitude or easement, yet this servitude does not impose upon the adjoining proprietor the obligation of furnishing an increased support where lateral pressure is increased by the erection of buildings, unless such a right of servitude has been conferred by grant or the lapse of time.
2. Where excavations are made upon one of two contiguous lots, the proprietor making the same will be responsible for all damage caused to buildings or other property upon the adjoining lot by reason of such excavation having been negligently made.
3. It is however erroneous to rule that the proprietor having the excavating done is bound to use such care and caution as a prudent man, experienced in such work, would have exercised, if he had himself been the owner of the injured building. Such a ruling tends to mislead, as one who is proprietor of both the contiguous lots might very prudently subject himself to expense and inconvenience for the protection of his building, that could not justly be imposed upon one making excavations upon an adjoining lot belonging to him.

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4. The excavator can not set up as a defence that he used such care as his builder and superintendent, a skillful and careful person, deemed necessary. The decisive question is, whether there was actual negligence in making the excavation.

Appeal from St. Louis Circuit Court.

This was an action to recover damages for injuries alleged by plaintiff, Joseph Charless, in his petition to have been sustained by him in consequence of the "negligent, unskillful and improper manner" in which defendant, David Rankin, made certain excavations upon a lot adjoining that of plaintiff, which, by undermining the foundations of plaintiff's building, caused the walls thereof to fall.

The defence set up was substantially a denial of the negligence alleged in the petition.

It is deemed wholly unnecessary to set forth the evidence bearing upon the point at issue, as the questions of law discussed and decided, can be fully understood from the instructions given and refused by the court below.

On motion of the plaintiff, the court gave the following instructions to the jury, to the giving of which the defendant excepted: "If the jury believe from the evidence that the digging for the foundation of defendant's building was performed in a reckless, negligent, or improper manner, and that by reason thereof plaintiff's house was thrown down, then plaintiff is entitled to recover such damage as he has sustained by the throwing down of his house. 2. If the jury believe from the evidence, that the fall of plaintiff's building might have been prevented by the exercise of reasonable care and skill on the part of those who were digging defendant's cellar, and that, owing to their failure to exercise such care and skill, damage resulted to plaintiff's building, then plaintiff is entitled to recover in this action such an amount of damages as he may prove he has sustained by the fall of his building. 3. In excavating by the side of another's building, it is the duty of the person having the excavating done to use such care and caution,

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to prevent injury to such building, as a sensible and prudent man, experienced in such work, would exercise, if he were the owner of the building; and the omission of such care and caution is culpable negligence, and renders the person having the excavating done liable for all the damages resulting therefrom.

6. The measure of damages in this case is the amount of money required to rebuild plaintiff's house as it was before the fall, and the value of the house thrown down to plaintiff during the time necessarily taken to rebuild it, with the interest on those amounts from the time when the house was completed, after its fall, to the present time."

And, on the prayer of the defendant, the court gave the following instructions to the jury: "2. In order to find for the plaintiff, the jury must find, not only that the falling of plaintiff's wall was occasioned by the digging of defendant's cellar, but also that such digging was done in a negligent or unskillful manner, which negligence or unskillfulness caused the plaintiff's wall to fall down. 3. If the jury believe from the evidence, that but for the rain which fell the night preceding the fall of plaintiff's wall, the said wall would not have fallen down, they ought to find for the defendant, if defendant omitted no proper precaution to guard against the rain; or, if the jury find that the plaintiff's wall, either because it was built upon an insufficient foundation, or of defective materials, or of insufficient thickness, or in a negligent or unskillful manner, and but for such defect or defects in construction, or materials, would not have fallen, they ought, in either such event, to find for the defendant."

The defendant then asked the following instructions, which the court refused to give, and the defendant excepted: "1. If the jury find that the defendant, in excavating his cellar, dug a proper depth, and entirely on his own land, the plaintiff can not recover. 4. If the jury find from the evidence, that defendant had employed a superintendent and architect to oversee and control and manage the erection of his building; and to erect the same, which architect and superintendent was skill-

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ful, experienced, careful, and competent to the purpose, and that all the care and precaution that said architect and superintendent judged sufficient to protect plaintiff's wall was used for that purpose, they ought to find for the defendant."

T. Polk, for appellant. 1. If the defendant's excavation would not have caused the land of the plaintiff, on which his house stood, to fall in if it had no building upon it, but had remained in its natural state, the plaintiff was not entitled to recover. (*Thurston v. Hancock*, 12 Mass. 220; 9 Barn. & Cress. 725; *Wyatt v. Harison*, 3 Barn. & Adol. 871; *Losala v. Holbrook*, 4 Paige's Ch. R. 173; *Hyde v. Thornburgh*, 2 Car. & Kir. 251.) 2. Further, if the defendant (*Rankin*) dug exclusively upon his own soil, and in nowise encroached upon the plaintiff's premises, the plaintiff had no right to recover against him. (2 Rolle's Abr. 564-5; 1 Com. Dig. action on the case for nuisance, 420.) 3. The fourth instruction prayed by the defendant, and which the Circuit Court refused to give, does assert that the principal is not liable for the negligence of his servants and agents, as the court below seemed to understand it, but that the facts stated in the instruction preclude the possibility of any negligence or unskillfulness on his part, and make a case of care and caution that put him beyond the possibility of a recovery in this action. (See case of *Hart v. City of Philadelphia*.) In an action for malicious arrest, or malicious prosecution even, it is a good defence to the action that the defendant followed the advice of competent counsel, asked and given in good faith, upon a full statement of the facts. (*Blunt v. Little*, 3 Mason, 102.)

Strong and Drake, for respondent. 1. The right of an owner of land to the enjoyment thereof is qualified by the rights of others. The maxim of the law is, "*sic utere tuo, ut alienum non lædas*." (Sedg. on Dam. 138; *Hays v. Cohoes Co*: 2 Comst. 159, 163.) 2. If plaintiff's building was thrown down by the negligent or unskillful manner in which defendant's servants dug his cellar, or by the omission on their part of reasonable and proper care and skill, in order to pre-

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vent the injury, then plaintiff is entitled to recover. (2 Stephens' Nisi Prius, 1011, 1012; 3 Kent's Com. 487 and note *b.*; Vaughn v. Menlove, 3 Bingh. N. 568; Trown v. Chadwick, *id.* 334, 353-4; Jones v. Bird, 5 Barn. & Ald. 837, 848; Tuberville v. Stamp, 1 Selk. 13; Roberts v. Read, 16 East, 215; Boughton v. Carter, 18 J. R. 405; Dodd v. Holme and others, 3 Neville & Manning, 739; 1 Adolph. & Ellis, 493; Clare v. Foote, 8 J. R. 421; Pantan v. Holland, 17 J. R. 92, at p. 100, 101.) 3. A person obstructing a public way, or using a privilege, will be held liable for all the damage resulting from his conduct, unless he use more than ordinary care to prevent injury. (Nelson v. Godfrey, 12 Ill. 20; Clarke v. Lake, Scam. 2 Ill. 219, p. 231.) While every man has the reasonable and proper use of his own property, he can not be, and ought not to be exempt from liability for damages resulting from the negligent, unskillful or improper use of it. So long as society exists, the rights of individuals must be affected, modified and abridged by the rights of others. The defendant had no better right to the use of his ground than plaintiff had to his. And the defendant, in the enjoyment of his rights, was bound to exercise reasonable care and skill to prevent injury to the rights of plaintiff. Every man may well be held responsible for the consequences of his negligence and want of reasonable skill in the performance of what he undertakes. But what is reasonable care and skill? The care and skill exercised by a prudent man, acquainted with the business he is performing, is, perhaps, the only standard, as it certainly is the best for determining whether there has been negligence in a given case. This is the rule laid down by the third instruction given.

LEONARD, Judge, delivered the opinion of the court.

The right to support from the adjoining soil may be claimed either for the land in its natural state, or for it subjected to an artificial pressure by means of building or otherwise. The

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right in the former case would seem to be a natural servitude or easement belonging to contiguous lots, and accordingly it was recognized and protected in the Roman law by specified regulations, and similar provisions have been introduced into the civil code of France. (Code Civil, art. 614.) We are not aware of any express common law decision upon this subject; but we find it said of old, in Rolle's Abr. 564, tit. Trespass: "It seems that a man who has land closely adjoining my land, can not dig his land so near mine that mine would fall into his pit, and an action brought for such an act would lie;" and in Wyatt vs. Harman, (3 Barn. & Adol. 874,) Lord Tenderden remarked, in delivering the judgment of the court of king's bench: "It may be true that, if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbor digs in his land, so as to occasion mine to fall in, he may be liable to an action."

X When, however, the lateral pressure has been increased by the erection of buildings, it seems to be well settled at common law by authorities, that no man has a right to an increased support unless he has acquired such a servitude by grant or prescription. It is so laid down in the early case of Wilder v. Minsterly (2 Rolle's Abr. 564). "If A. be seized in fee of copy-hold land, closely adjoining the land of B., and A. erect a new house upon his copy-hold land, and any part of his house is erected on the confines of his land, adjoining the land of B.; if B. afterwards dig his land so near to the foundation of the house of A., but not in the land of A., that by it the foundation of the messuage and the messuage itself fall into the pit, still no action lies by A. against B., inasmuch as it was the fault of A. himself, that he built his house so near the land of B.; for he can not, by his own act, prevent B. from making the best usage of his land that he can." And Lord Tenderden, in delivering the judgment of the court in the case before cited, said: "The question reduces itself to this: if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there,

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so as to remove some part of the soil which formed the support of the building so erected, whether an action lies for the injury thereby occasioned. Whatever the law might be, if the damage complained of were in respect of an ancient messuage, possessed by the plaintiff, at the extremity of his own land, which circumstance of contiguity might imply the consent of the adjoining proprietor at a former time to the erection of the building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected, and if so, then, according to the authorities, the plaintiff is not entitled to recover." In the more recent case of Partridge v. Scott, (3 Mees. & Wels. 220,) which involved the same question, it is said: "If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbor. He has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect;" and the American cases are, it is believed, to the same effect. (Thurston v. Hancock, 12 Mass. 221.))

Although not altogether in good taste, I repeat, as applicable to the present case, what I had occasion to say in a former case. It is a logical consequence from legal principles, that to the extent to which a person has a right to act, others are bound to suffer; and that any damage that may accrue to them, while a person thus exercises his own rights, affords no valid ground of complaint. The loss occasioned in such cases is "*damnum absque injuria*." Every person, however, who is performing an act is bound to take some care in what he is doing. He can not exercise his own indisputable rights without observing proper precaution not to cause others more damage than can be deemed fairly incident to such exercise. In Wallars v. Pfeil, (Mood. & Malk. 364,) the plaintiff had neglected to take any precaution by shoring up their own houses within, or in any other way against the effect of pulling down the defendant's adjoining house; and it appeared that this might have been so

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done that the accident would not have happened to the same extent. There was also evidence to show that the accident was owing to the bad foundation of the plaintiff's house; but there was conflicting evidence as to whether, by due care on the part of the defendant's workmen, the mischief might have been entirely avoided. In summing up, the chief justice of the queen's bench stated it to be now settled that the owner of premises adjoining those pulled down, must shore up his own in the inside, and do every thing proper to be done upon them for their preservation; but, although that had not been done, still the omission did not necessarily defeat the action, and that if the pulling down were irregularly and improperly done, and an injury were produced thereby, the person so acting would be liable, notwithstanding the omission of the plaintiff; and the jury were accordingly charged, that, if the defendant's house was pulled down in a wasteful, negligent and improvident manner, so as to occasion greater risk to the plaintiff than in the ordinary course of doing the work he would have incurred, then the defendant was liable to make compensation for the consequences of his want of caution; but that if they thought fair and proper caution had been exercised, then the defendant would be entitled to a verdict. The result of the cases, we think, is, (and such would seem to be the reasonable doctrine,) that, if a man in the exercise of his own rights of property do damage to his neighbor, he is liable, if it might have been avoided by the use of reasonable care; and it seems to be usual in England for a party intending to make alterations that may affect his neighbor's premises, to give notice of his intention; but whether any such duty be imposed by law (*Town v. Chadwick*, 8 Scott, 1) need not be inquired into here, as the present plaintiff knew of the digging and took measures to protect himself against the consequences of it.

These principles require us, we think, to reverse the judgment, and send the case back for a second trial. We do not think there is any error in the refusal of the defendant's first and fourth instructions. A party may subject himself to re-

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sponsibility by the want of reasonable care, although his digging be confined to his own ground and do not exceed a reasonable depth; nor is he protected by the fact that he used such care as his builder, who was a skillful and careful person, deemed necessary. The question is, as to the fact of negligence, whether the work were done in a careless and improvident manner, so as to occasion greater risk to the plaintiff than in the reasonable course of doing the work he would have incurred, and not whether, in the opinion of the superintendent, no matter how skillful he may have been, every thing was done that he deemed necessary. His opinion may be proper evidence to be considered by the jury, but it does not conclude the matter, constituting of itself a bar to the plaintiff's recovery. (But the error is in plaintiff's third instruction, where an attempt is made to define, with precision, the degree of care that must be used in a case like the present, in order to exempt a party from liability; and the standard there adopted is substantially that care that a prudent man, experienced in such work, would have exercised, if he had been himself the owner of the injured building. Now it is quite evident, we think, that this is going beyond the care that the law exacts upon such occasions. It is to be observed that the defendant was upon his own ground, and in digging upon it, exercised an undoubted right of property, which the plaintiff had no right, either by express grant or prescription—by statute or local ordinance—in any way to interfere with or prevent; and although, in exercising his rights, it was certainly his duty to his neighbor to use ordinary care in order to avoid doing him harm, he was not bound to observe the same care that he would have taken, as a wise and sensible man, if he had been the owner of both buildings—the one erected and the one about to be erected. ¶ He would, of course, in that event, have shored up and would have submitted to many inconveniences, and, indeed, would have incurred considerable additional expense in doing the new work, rather than expose the building already erected to any risk. Every prudent person, in such a situation, would take precau-

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tions—subject himself to inconveniences, and forego the exercise of every right that would endanger his present building, if he found it for his interest to do so. In the present case, if the laying of the new foundation, in very short sections, would have been attended with increased expense and with danger to the sufficiency of the new wall, and the defendant had been the owner of the plaintiff's building, he might have found it for his interest to have submitted, and most probably would have submitted, to this inconvenience and risk, and even increased expense, to avoid all hazard to his own property; yet the law does not exact of him the same forbearance and care and expense for the security of his neighbor's property that he would have found it for his interest to have taken for his own. We do not know that the instruction was intended, or indeed understood by the jury in the sense we impute to it. It may, however, have been so understood, and if so, could not but have misled them; and we shall therefore reverse the judgment, that the case may be retried upon a fuller understanding of the facts and of the law applicable to them.

The judgment is reversed, and the cause remanded.

LEE *et al.*, Respondents, v. STERN *et al.*, Appellants.

1. Where, in an action on a contract, an offer was made by the defendant in writing, under section 1 of article 23 of the practice act of 1849, to allow judgment to be taken against him for a certain sum, which offer was accepted by plaintiff and judgment entered accordingly; *held*, that defendant is not entitled to a judgment for costs, on the ground that the sum for which judgment is thus allowed to be taken is below the jurisdiction of the court.

Appeal from St. Louis Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

Hill, Grover & Hill, for appellants.

Hudson & Thomas, for respondents.

SCOTT, Judge, delivered the opinion of the court.

The question in this case arises under the 1st section of the 23d article of the present practice act. The section referred to is in these words : " In any action arising on contract, the defendant may, at any time before trial or judgment, serve on the plaintiff an offer in writing, to allow judgment to be taken against him for the sum, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof, within ten days, he may file the offer and an affidavit of notice of acceptance, and judgment shall be entered accordingly. If the notice of acceptance be not given, the offer shall be deemed withdrawn, and shall not be given in evidence or commented on before a jury ; and if the plaintiff fail to obtain a more favorable judgment, he shall recover no costs, but shall pay the defendant's costs from the time of the offer."

This was an action on a contract, and the defendant made an offer to confess a judgment for \$31 50, which was accepted by the plaintiffs. The suit was in the Court of Common Pleas. Judgment was entered for the sum confessed, and also for costs. The defendants maintained that the judgment for costs should have been entered for them, as the amount confessed, and for which judgment was rendered, was below the jurisdiction of the court. The question is, for whom should the judgment for costs have been given ?

This case, in our opinion, is not influenced by the general law of costs, nor the decisions which have been made under it. It stands on the section of law which has been copied above. We conceive it would be evidently against the spirit of the act to make the plaintiff lose his costs by an acceptance of the offer of the defendants. Such a construction would little harmonize with its policy, as in many cases it might prevent a compromise. As the statute confers a privilege on the defendant at the expense of the plaintiff, there is no authority for extending it further than its terms will warrant. If a plaintiff will, in the spirit of the act, accept the offer, it would be hard

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to subject him to the payment of costs, as he finds no intimation in the law that, by so doing, such a consequence must follow. The provision is in terror to the plaintiff, and if he yields to it, there is no reason why he should be subjected to a liability not mentioned in the statute.

The judgment is affirmed ; the other judges concurring.

PEARCE, Respondent, v. BURNS, *et al.*, Appellants.

1. Where a cause is tried by the court sitting as a jury, the finding of the facts should warrant the conclusion of law declared by the court and the judgment rendered ; in reviewing the law of a case upon the facts found, the supreme court will not, from the facts, as found, infer or declare the existence of other facts.

Error to St. Louis Court of Common Pleas.

This was a suit commenced by attachment upon two promissory notes, executed by defendants, James Burns and Henry Burns, amounting in the aggregate to \$283 50. The writ of attachment was predicated upon an affidavit that defendants had " fraudulently concealed or disposed of their property and effects so as to hinder and delay their creditors." This writ was served upon E. G. Roberts and Benjamin F. Kerr, of the firm of Roberts, Kerr & Co., as garnishees.

Defendants put in issue, by a plea, the truth of the facts alleged in the affidavit. Upon the issue thus raised, the court, sitting as a jury, found for plaintiff, and judgment by default was afterwards given for plaintiff for the full amount of the notes sued upon. The following is the finding of the facts by the court upon the issue raised by the plea to the affidavit : "That in January, 1854, the copartnership of Burns & Brother was composed of James Burns and Henry, and was doing business in Warsaw, Missouri ; that said copartnership was at that time in failing circumstances ; that it was indebted to the firm of

Houseman & Lowry, of St. Louis, for over eleven hundred dollars, cash advances, and was also indebted to the plaintiff and to others in St. Louis ; that Houseman, of the firm of Houseman & Lowry, went to Warsaw in that month to collect the debt due Houseman & Lowry ; that Houseman took a bill of sale of a lot of bacon and lard belonging to Burns & Brother, supposed to be worth at the time in Warsaw two thousand five hundred dollars, to secure the payment of the demand of Houseman & Lowry, and under said bill of sale took possession also of the property itself. The same had been previously stored by Burns & Brother, in a warehouse owned by Mr. Hicks. Houseman rented the warehouse of Hicks, and took the key thereof, and, on leaving Warsaw for St. Louis, left the key with the firm of Henry Boreland & Co., or with Mr. Blakey, as the agent of Houseman & Lowry. Before leaving Warsaw, Mr. Houseman was requested by the defendant to accept certain bills which he would draw in favor of some of the debtors of Burns & Brother in St. Louis, for the surplus, if there was any, as it was supposed there would be, after paying out of the proceeds of the sale of said property the demand of said Houseman & Lowry. Houseman refused to promise to accept said drafts, but agreed that out of said surplus he would pay such drafts to the extent of the surplus, in the order in which such drafts should be presented to him. In February, 1854, Mr. Simpson, as agent of the plaintiff, called on Burns & Brother, in Warsaw, to collect a demand that the plaintiff had against them. They gave to Simpson a draft on Houseman & Lowry, in favor of the plaintiff, for a part of his demand, and promised thereafter to pay the balance, assuring said Simpson, at the time, that said draft would be paid by Houseman & Lowry ; that they (Burns & Bro.) had put said property in the possession of Houseman & Lowry, and that there would be a surplus large enough to satisfy the draft. Said draft was presented by said Simpson, as plaintiff's agent, to said Houseman & Lowry, and the latter declined to accept, as the property had not yet arrived, or been shipped ; but promised, if there was a

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sufficient surplus, to pay that draft, after the payment out of the surplus of two others that had been previously presented. Burns & Brother were insolvent at the time Simpson called on them, and continued to be so until after these transactions. In June following, the property in question was shipped in the name of and by Martin & Cook, of Warsaw, to Roberts, Kerr & Co., of St. Louis, under instructions from Martin (who was brother-in-law of James and Henry Burns) to pay out of the proceeds of the shipment to Houseman & Lowry their demand against Burns & Brother, and hold the balance for Martin & Cook. Said property was not shipped on the order or with the consent or knowledge of Houseman & Lowry. They never redelivered to Burns & Brother, or ever authorized any one to do so for them. The first knowledge they had of said shipment was after Martin & Cook came to St. Louis with it, consigned to Roberts, Kerr & Co. The latter firm paid out of the proceeds of the shipment to Houseman & Lowry their demand, amounting to \$1258 02. The balance of the proceeds, amounting to \$534 81, still remains in the hands of Roberts, Kerr & Co., to the credit of Martin & Cook, said latter having been stopped by judicial process. Burns & Brother knew of the shipment in the name of Martin & Cook to Roberts, Kerr & Co. How Martin & Cook got possession of the property, so as to ship it, the evidence does not disclose. Houseman & Lowry did not give any order for its shipment by Martin & Cook, or to Roberts, Kerr & Co. When the plaintiff ascertained that the property in question had been shipped to Roberts, Kerr & Co., instead of Houseman & Lowry, he instituted this suit by attachment.

“Upon the foregoing facts, the court finds that, at the commencement of this suit, the defendant had fraudulently concealed or disposed of his property or effects, so as to hinder and delay his creditors, and declares that the plaintiff is entitled to proceed with this action.”

Bay, for plaintiff in error.

Wickham & Snead, for defendant in error.

LEONARD, Judge, delivered the opinion of the court.

The issue made in the cause by the plea in abatement was, whether the defendants had "fraudulently concealed or disposed of their property, so as to hinder or delay their creditors." Upon a trial by the court, the facts involved in it were specially found, and the court having pronounced upon these facts that the defendants had concealed or disposed of their effects as alleged, the only question now submitted to us is, whether the facts so found justify the conclusion. We do not think enough is found to enable us to declare, as a matter of law, against the defendants upon the plea in abatement, and for this reason the judgment must be reversed, and the cause remanded. We always regret being under the necessity of determining a case upon what may turn out to be a mere matter of form; but the obligation we are under of deciding each case by general rules, applicable alike to all similar cases, sometimes imposes this necessity upon us, and the particular evil must then be submitted to on account of the general good that results from the strict adherence to principles. It may be that the inferior court was entirely satisfied upon the evidence before it, that the bacon and lard were put into the possession of Martin & Cook by the direction of Burns & Brother, to be shipped by the former, in their own names, to St. Louis, but upon a secret trust for the defendants; and that the purpose of the defendants, in thus disposing of their property, was to conceal it from their creditors and secure it for their own use; and that the court would have so expressly found, if their attention had been called to the matter. But yet no such intention or purpose or trust has been found as a fact in the case, nor indeed is it found that the defendants had any part or lot in the shipment to St. Louis, (although it seems they knew of it,) or in the disposition of the property here. The fact is, that no matter how the truth may be, there is nothing found incompatible with the idea that the defendants were guiltless of the charge imputed to them. It was for the plaintiff to prove his allega-

tion, and, although the circumstances stated in the finding may be sufficient not merely to arouse suspicion, but fully to justify a jury or a court sitting in the trial of the fact, in inferring that the shipment to St. Louis, and the disposition of the property there, was or has been suggested, yet *we* can not draw this inference as a mere natural presumption, and in this way supply the omission. We sit here, in cases like the present, to determine questions of law, and not to try matters of fact, and must therefore limit ourselves to pronouncing conclusions of law upon the facts found, and can not infer from these facts other facts by the force of mere natural presumptions, and then pronounce, upon the combined effect of both, the facts thus *inferred* and the facts expressly found.

It may not be improper here to advert for a moment to the views expressed by this court as to the character of the finding required by the law, when the trial is by the court, and as to the province and duty of this court, when the question here is as to the sufficiency of the finding to settle the issues of fact made between the parties. In *Bates v. Bower*, (17 Mo. 553,) it is said: "The decision is evidently a substitute for a special verdict, or the statement of facts in the old form of rendering a decree in chancery." The same views are reported in *Farrar v. Lyon* (19 Mo. 123): "The finding of the court is like a special verdict in containing a finding of facts not of evidence." And in the *St. Louis Hospital Association v. Williams' adm'r*, (19 Mo. 612,) it is said: "In reviewing the law of a case upon the facts found, it is not the province of this court, from one or more facts, as found, to deduce the existence of another fact." Speaking alone for myself, I remark that perhaps it might have been better originally to have holden it to be sufficient to find the issuable facts alleged in the pleading, in the general form in which it was allowable to plead them, but this was settled otherwise; and as this provision is omitted in the Revised Code of 1855, a reconsideration of the matter, even if it were allowable, would be of no practical value. Under the law as now settled, the facts constituting

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the ultimate issuable fact put in issue between the present parties, must be so found that this court can pronounce, as a matter of law, that they constitute a fraudulent disposition or concealment of the party's property, within the meaning of the plaintiff's allegation; and we think that can not be done upon the present finding, even supposing that if we were sitting in the trial of the fact, the circumstances found would satisfy our consciences of the truth of the allegation.

The judgment is reversed, and the cause remanded.

PEARCE, Appellant, v. ROBERTS *et al.*, GARNISHEES OF BURNS,
Respondents.

1. Pearce v. Burns, ante, (p. 577,) affirmed.

Appeal from St. Louis Court of Common Pleas.

This was a suit commenced by attachment against James and Henry Burns (the latter of whom died pending the suit), of the firm of Burns & Brother, on two promissory notes. Roberts and Kerr were summoned (the former, June 19th, 1854, the latter, July 14, 1854,) as garnishees, and interrogatories filed. The garnishees denied in their answer all indebtedness to Burns & Brother; also the possession of any property belonging to Burns & Brother. Plaintiff replied to this answer, and denied so much of the answer of the garnishees as alleged "that at the time they were summoned herein as such, they were not in possession of any goods, money, or effects of the defendants as charged," &c. Upon the trial of the issue thus raised, the court found the facts to be as follows: "That the property mentioned in the following writing came to the hands of the garnishees as hereinafter stated.

"Warsaw, Benton county Mo., Jan'y 24, 1854.

"Received of Messrs. Houseman, Lowry & Co., of St. Louis, Mo., \$1074 09, as an advance in cash on lard in bar-

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rels and kegs, hams, shoulders and sides in bulk, the product of three hundred and sixty hogs, now stored in L. H. Hicks' warehouse in Warsaw, the same to be shipped to Messrs. Houseman, Lowry & Co., St. Louis, on opening of navigation, for sale for account of Messrs. Burns & Brother, and to be covered by Messrs. H., L. & Co. by fire and marine insurance, and now subject to their order, control and possession; proceeds, after the above advance and charges, to be subject to order of Messrs. Burns & Brother. [Signed] Burns & Brother. [Witness,] Y. C. Blakey."

"I hereby acknowledge that, in my presence, Mr. J. D. Houseman took possession of property, of meat consisting of hams, sides and shoulders, lard in barrels and cans, for advances made to Messrs. Burns & Brother, for use of Messrs. Houseman, Lowry & Co., consisting of the product of 360 hogs, now in warehouse, which Mr. H. L. Hicks is agent and has control. Warsaw, January 24th, 1854. [Signed] Y. C. Blakey."

After the execution of said paper, Mr. Houseman, for Houseman, Lowry & Co., took possession of said articles and put them in a warehouse, rented for the purpose, at Warsaw, Mo., and left the key with the agent of Houseman & Lowry, directing that the goods should be sent forward to St. Louis according to the orders to be by them thereafter given. At the time, it was supposed by Burns & Brother and by Houseman that the articles would sell for more than enough to satisfy the demands and charges and commissions of Houseman & Lowry. It was therefore agreed by Houseman & Lowry that they would accept drafts for the balance which might be in Houseman & Lowry's hands, after the goods were sold and the claims of the latter were satisfied out of the proceeds of the sale. Houseman & Lowry sent by the steamboat Kentucky No. 2 an order on their agent to forward the articles to them by the said steamer. Said articles were brought on said steamer, consigned by Martin & Cook to the garnishees, with directions to pay Houseman & Lowry their demands out of the proceeds of

the sale, and to pass the balance to the credit of Martin & Cook. Martin is a brother-in-law of James and Henry Burns. The evidence does not show how Martin & Cook got possession of the articles. Houseman & Lowry never authorized Martin & Cook to take possession of or meddle with said articles in any way, nor were they aware, until the articles reached St. Louis, that Martin & Cook, or any one but Houseman & Lowry's agent, had got possession of the articles or attempted to control them.

After the articles had been delivered to Houseman & Lowry at Warsaw, as aforesaid, and Burns & Brother had requested, and Houseman & Lowry had promised, to accept drafts for said balance as aforesaid, and after the return of Houseman to St. Louis and before the articles were forwarded to St. Louis, drafts were drawn by Burns & Brother on Houseman & Lowry for various sums, one of said drafts being in favor of Pearce & Benedict for \$342 25; the amount of said drafts by Burns & Brother on H. & L., in favor of various parties, exceeding the balance of the proceeds of the sale after payment of the demand of Houseman & Lowry. Said drafts were duly presented to Houseman & Lowry and they declined formally accepting them, but verbally promised to pay the same out of the said balance, in the order in which they were presented, so far as said balance would go, when received. Afterwards, when the articles came forward, consigned as aforesaid to the garnishees, (the articles arriving here on the 6th day of June,) Mr. Houseman called on the garnishees on the 7th day of June, and told them that the articles belonged to Houseman & Lowry; that Martin & Cook had nothing to do with them; that they (H. & L.) did not themselves care about the articles, further than to get the amount due them; and unless they were paid, they should take possession of the articles, and that they (H. & L.) had agreed to pay over to the payees of the aforesaid drafts the balance after the claim of Houseman & Lowry was satisfied.

Houseman & Lowry not taking possession of the articles, the

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garnishees went on and sold the articles. The gross proceeds of the sale were \$2080 62; commission and charges, \$237 81; nett proceeds, \$1792 81. On the 9th of June, Martin & Cook bought of garnishees goods to the amount of \$450 64. The garnishees paid Houseman & Lowry's claim—\$1258 02—and passed the balance to the credit of Martin & Cook, applying \$450 64 thereof to the payment of what was due from Martin & Cook to the garnishees.

Thereupon, the court declares that the garnishees were not, when summoned as garnishees in this case, the debtors of James and Henry Burns, and the plaintiffs are not entitled to recover in this action.

Judgment was accordingly given against the plaintiff, and the garnishees recovered their costs, &c.

A motion for a review was made by plaintiff, and overruled, and the case is brought here by appeal.

Wickham & Snead, for appellant.

Biddlecome, for respondent.

LEONARD, Judge, delivered the opinion of the court.

This cause must take the fate of *Pearce* against *Burns*, ante, (p. 577,) and be reversed and remanded, on the same grounds; and we refer to the opinion in that case, instead of repeating here what is there said. Both suits arose out of the same transaction, and the principal question in both was, whether the disposition of the property to Martin & Cook, made by Burns & Brother, was an honest transaction, or a mere transfer of the formal title, in order to protect the property for the latter against their creditors. In the former case the attachment against *Burns* was attempted to be supported on that ground, and in the present suit that we suppose is the ground upon which these defendants, who had in their hands, as commission merchants, the proceeds of the property which had been shipped to them by Martin & Cook, are to be charged as the garnishees of Burns & Brother. If the garnishees have any just claims

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upon the property arising out of their own transactions with Martin & Cook, these, of course, will not be affected by any fraudulent combination between others to which they were not privy; but if, at the time of the garnishment, they held the money for Martin & Cook, who held it in fraudulent trust for Burns & Brother, they must answer for it, we suppose, to the creditors of the latter. Here, however, the facts found are not sufficient to enable us to determine, as a matter of law, that such was the character of the transaction between Martin & Cook and Burns & Brother.

The judgment is therefore reversed, and the cause remanded; Judge Ryland concurring.

AMES, Appellant, v. BIRCHER AND ANOTHER, Respondent.

1. Case affirmed because no exceptions were taken; no bill of exceptions allowed.

Appeal from St. Louis Law Commissioner's Court.

Broadhead, for appellant.

Wickham & Snead, for respondent.

RYLAND, Judge. In this case there is nothing upon the record for us to decide—no bill of exceptions taken or appearing; nor does it appear that any act or ruling of the court below was excepted to at the time by either party. It may be true, if the facts be as represented, that Wash was improperly admitted as a party; but even that error, if it occurred, could not have prejudiced the adverse party. This alleged error, however, is not saved; and there is no reason why this case should have been brought here.

Judgment affirmed; the other judges concurring.

PICOT, Appellant, v. SIGNIAGO, Respondent.

1. A surety may contract as a "principal," and by so doing will renounce the right of setting up a defence arising out of the relation of principal and surety.
2. A. and B. executed a bond whereby they obligated themselves "as principals" to build a house for C., the house to be built by A.; payments to be made as the work should progress, retaining twenty-five per cent. on the amount of work done, and the balance after the entire completion of the work, &c., to the satisfaction of the said C., and after the settlement of "all lawful claims, liens or demands against said work, on account of materials furnished or work done;" and C. to be secured "from all claims and losses." Liens were filed by material men against the building, which were paid by C. *Held*, in a suit by C. against B., that B. could not set up as a defence that C. had paid to A. the whole value of the work done, not reserving the 25 per cent.; he (C.) not knowing at the time that there were valid liens upon said building.
3. In order to entitle C. to recover compensation in such a case, it is not necessary that payment of the sums for which the liens were held should be first enforced by suit and execution. All that is necessary is that they should be valid liens and enforceable.

Error to St. Louis Court of Common Pleas.

This was a suit brought by Louis G. Picot against James Signiago, to recover damages for the breach of a contract. Picot entered into a contract with one Porter Bush, to do all the necessary brick work, according to certain specifications, of a market-house, then about to be erected by said Picot. The contract among other stipulations contained the following: "And the said Louis G. Picot, on the second part, does hereby covenant and agree with the said Bush, that he shall and will pay to the said Bush, his heirs or assigns, for the entire completion of the work mentioned, to the satisfaction of the said superintendent, at the rate of \$3 50 per thousand of bricks, measured when in the walls, without any extra allowance; payments to be made as the work progresses, retaining twenty-five (25) per cent. on the amount of work done, and the balance after the entire completion of the work to the satisfac-

tion of the said Louis G. Picot or superintendent, and after the settlement of all lawful claims, liens or demands against said work on account of materials furnished or work done." There was also this further clause : " And for the faithful performance of all and singular the terms of this contract, and for the securing the said Picot from all liens, claims and losses, the said Bush, and James Signiago, and ———, *all as principals*, do hereby bind themselves, their executors, administrators and assigns, unto the said Picot, in the penal sum of one thousand dollars, firmly by these presents. Witness our hands and seals this 16th of September, 1850. [Signed] Porter Bush, (seal). James Signiago, (seal).

Plaintiff assigned as a breach of said contract that the said Bush and Signiago had not secured plaintiff from all liens, claims and losses, but that a large number of liens upon said building had been filed in the office of the clerk of the Circuit Court by mechanics and laborers employed upon said building by said Bush, which liens were claims and charges upon said building valid in law. Plaintiff alleged that he had paid \$104 38 of said liens ; that the remaining valid liens against said building amounted to \$277 55 ; that plaintiff, at the urgent solicitation and request of the said Bush, paid to him all the money due to him on account of said contract, with the exception of about \$46, and that such payments were made without any knowledge that any liens had been filed.

The defendant, in his answer, admitting the execution of the contract, says : " That, according to said agreement, the said plaintiff had in his possession moneys belonging to said Porter Bush, and retained from said Bush more than sufficient to pay every liability, lien, claim and demand against said market-house mentioned in plaintiff's petition, due or to prove due, or arising from the work done by said Bush ;" and more than sufficient to pay all debts, dues and demands against said market-house by reason of any failure on the part of the said Bush to faithfully perform all and singular the terms, conditions and stipulations in said agreement, &c.

On the trial, plaintiff gave testimony tending to prove the value of the work done by Bush under the above contract; also the amount paid by plaintiff to Bush on account of said work; that a number of liens and claims on the building were filed in the clerk's office of the Circuit Court; that judgments were obtained on said liens in the Circuit Court, and that plaintiff paid those judgments.

Plaintiff then offered to prove that a number of liens and claims on said building were filed by different persons; that they were prosecuted to judgment against Bush before a justice of the peace for St. Louis county, and that plaintiff paid these judgments without the filing of any transcripts in the clerk's office of the Circuit Court, and without the issue of any executions thereon, and offered, in this connection, to prove that the payments were made by plaintiff upon representation made to him by the respective claimants that they would file a transcript and take out execution on their respective claims unless they were paid; that such payments were made by plaintiff to save the accumulation of costs. This testimony was ruled out by the court. To this exclusion plaintiff excepted.

Plaintiff further showed that Bush left the country about or just before the time of the completion of the building, and that plaintiff, a few evenings prior thereto, paid Bush almost the whole of the 25 per cent. then in his (plaintiff's) hands at the request of Bush, and without the knowledge or consent of defendant (Signiago).

The following instruction, asked by plaintiff, was refused by the court: "1. If the jury believe from the evidence in this case that the plaintiff paid the judgments obtained in the Circuit Court upon the liens filed against the Harney market, they will find for the plaintiff the amount so paid, (deducting therefrom the amount, if any still due from plaintiff to Bush,) with interest from the time when said amounts were paid." Plaintiff excepted to the refusal of this instruction.

The court then gave the following instruction: "2. If the jury believe from the evidence that the plaintiff paid on the

judgments in the Circuit Court, read in evidence, any sums of money, they will find for the plaintiff, unless they further find that 25 per cent. of the contract price of the work done by Bush, under the contract sued upon, together with the amount due Bush, still in the hands of plaintiff, equals or exceeds the amount so paid by plaintiff. By the terms of the contract sued upon, the plaintiff was to retain 25 per cent. of the contract price of the work and materials furnished by Bush on the building in question, until the work was completed, and until all lawful claims, liens and demands against said work, on account of materials furnished or work done, were settled; and if plaintiff, before the completion of said work and settlement aforesaid, paid over to said Bush any portion of said 25 per cent., then the defendant is entitled to have the portion of said 25 per cent. so paid over, and also whatever is still due to said Bush, deducted from the amount of payment made by the plaintiff on the liens offered in evidence. If after making such deductions the balance is in favor of the plaintiff, they will find for the plaintiff and assess his damages at the amount of said balance. If there is no such balance in favor of the plaintiff, they will find for the defendant." Plaintiff excepted to the giving of this instruction.

Plaintiff submitted to a nonsuit, with leave to move to set the same aside, and a motion to that effect having been made and overruled, the case is brought here by writ of error.

C. B. Lord, for appellant. 1. Signiago was a principal in the contract. 2. Appellant was not bound to retain 25 per cent. of the contract price of said work. 3. Appellant was entitled to recover the amount paid by him on all the liens on which judgment was obtained before the justice. I. When a man contracts to make himself a principal, the law will not make him a surety. (10 Barn. & Cres. 578; 1 M. & W. 568; 10 Pet. 257; 14 Pet. 201; 2 Am. Lead. Cases, 180.) It was expressly stipulated that the liability of Signiago was to be that of a principal. *Modus et conventio vincunt legem*. Where several parties sign an instrument as if all were princi-

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pals, but the relation of principal and surety exists as between the parties, that fact may be proved; but where, as in this case, the surety in fact agreed to become principal, his legal liability is that of a principal. The court below, in giving and refusing instructions, assumed that the relation of Bush and Signiago, as between themselves, controlled the rights of appellant against the express agreement of Signiago. If the liability of Signiago was that of a principal, the court erred in refusing the instruction asked for by appellant, and in assuming, by the instructions given, that appellant was bound to retain 25 per cent. of the contract price in his hands. II. Appellant was not bound to retain 25 per cent. of the amount of the contract price in his hands. It was a privilege only reserved to himself; no liens were filed at the time. III. The appellant can recover for all moneys paid upon the judgment obtained before a justice of the peace on liens duly taken. The court below thought that the payment without the issue of execution of the judgments in all cases where liens had been taken, was voluntary. It was in no sense a voluntary payment, nor does the doctrine of voluntary payments apply to the case. The payments were made, as appears by the record, after lien filed and ascertainment of the amount by the judgment of a tribunal of competent jurisdiction; all the subsequent proceedings required by the statute are in the nature of execution; the payment was made to save costs. Now suppose a suit brought against Bush for money paid on those liens, would there be any doubt about a recovery against him? Signiago stands precisely as Bush would have stood had he been sued.

Hart & Jecko, for defendant in error. 1. The court below properly excluded the testimony offered by appellant. The judgment before the justice was against Bush, and no act was done by the plaintiff to perfect said judgment, so as to make it a lien on the building; and the voluntary payment of a judgment against Bush, which might or might not have been sufficient to have made it a judgment against the building, does not in any way bind Signiago to account to Picot for said payment,

so voluntarily made, they being judgments against Bush and not liens on the building. The judgments before the justice were mere judgments against Bush, and did not even operate as a lien on the real estate of Bush. No act was done to perfect, by means of said judgments, a lien against the Harney market, which could only be done by filing a transcript of the judgment in the Circuit Court; and the payment by Picot of those judgments amounts to the fact that Picot has paid some debts against Bush, and no further can such testimony go. Certainly it is incompetent testimony to charge Signiago. 2. The instructions given by the court were proper and legal. The contract was made between Picot, as trustee, with Bush; and one of the conditions in said agreement is, that the said Picot is to retain 25 per cent. on the amount of work done and hold the same until after the entire completion of the work to the satisfaction of Picot or the superintendents, and after the settlement of all legal claims, liens or demands against said work on account of materials furnished or work done. Picot, then, was bound to retain the 25 per cent. of the amount of work done until the completion of the building, and all legal liens, claims or demands against said market-house were satisfied; and having that in his hands and possession, and parting with it or surrendering it to Bush, without the knowledge or consent of Signiago, Mr. Picot loses his claim against Signiago to the amount of the said 25 per cent. so surrendered to Bush. (*Baker v. Briggs*, 8 Pick. 122; *Mayhew v. Crickett*, 2 Swaust, 185.) We maintain that, though the word security is not annexed to the name of Signiago in the penal part of the agreement, yet that from the instrument itself, its nature and character, Signiago, being sued alone, will be legally considered as a security for Bush's faithful performance of the contract; and that Signiago, notwithstanding the word security is not used in the instrument itself, was very properly held to have signed as surety for Bush. We call the attention of the court particularly to the case of *Baker v. Briggs* (8 Pick. 122), in support of this position.

SCOTT, Judge, delivered the opinion of the court.

The instruction on which the cause went off in the court below, was not based upon any defence set up in the answer of the defendant; but as the point may come up again after an amendment, and as it was the only matter that was argued before us, it may be necessary to express an opinion in relation to it. The question is, whether one who becomes a party to a bond as surety in reality, and who would be regarded as such but for binding himself "as principal," can claim the right, or set up the defence, growing out of the relation of principal and security.

There is no rule of law which prohibits a surety from waiving the right belonging to him as such. Such a waiver has nothing in itself offensive to the policy of the law. Nor is there any thing in the situation of the surety in regard to the party with whom he contracts, which excites the vigilance or arouses the jealousy of the law. Usually the surety is less subject to the influence of the person with whom he deals, than any other contracting party. There is nothing of surprise or mistake alleged in the transaction. When the relation of surety has been created, there are certain safeguards thrown around it for its protection; but the law throws no obstacles in the way of a renunciation of those rights. If the surety here has not stripped himself of that relation by the contract he has entered into, it is not easy to see in what manner that object can be accomplished. He expressly binds himself "as principal." Now there must have been some purpose in adopting that word. When the term "principal" is used in a contract, it must be intended in a sense opposite to that of "security." The defendant might have become a mere surety to the contract, but when he renounced that character and expressly bound himself as principal, with what face can he afterwards insist that he is only a surety? When the plaintiff would not take his obligation as surety, but required him to be bound as principal, where is the justice in depriving him of the fruits of his vigi-

lance, and imposing on him a contract directly contrary to that for which he expressly stipulated? To hold that the defendant is not bound as principal in this contract, is tantamount to declaring that one who really occupies the relation of surety in a contract, can not be bound as principal—a proposition for which there is no support in the law. We are not without authority on this point. In our highest tribunal, the Supreme Court of the United States, this question has undergone elaborate discussion, and the principle announced there harmonizes with the views here expressed.

In the case of *Spriggs v. The Bank of Mount Pleasant*, (10 Pet. 257,) those who were sureties in reality bound themselves “as principals” to pay a sum of money, and attempted a defence growing out of their relation as sureties. The defence did not prevail. The court said, “when one who is in reality only security, is willing to place himself in the situation of a principal, by expressly declaring upon his contract that he binds himself as such, there can not be any hardship in holding him to the character in which he assumes to place himself. As to that particular contract, he undertakes as a partner with the debtor, and has no more right to disclaim the character of principal than the creditor would have to treat him as principal, if he had set out in the obligation that he was only surety.” The same parties afterwards renewed their defence in a court of equity, and the case was up in 14 Pet. 207; the court there remarked that “all the evidence showing that the party was surety, can have no influence against his direct admission in the obligation that he was a principal; and there being no pretence of any mistake or surprise, there can be but one meaning attached to this admission, which is, that as, between the obligors and the bank, all were principals, whatever might be their relation between themselves. They had undoubtedly a right to waive their character and legal protection as sureties, and assume the character of principals. This admission in the obligation must have been for some purpose; and none can be reasonably assigned, except that it was intended to place

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all the obligors upon the same footing with respect to their liability."

It may be said that there is a difference between the case under consideration and that to which reference has been made, inasmuch as by the bond before us it appears that the defendant was a mere surety ; whereas, in the case referred to, it did not appear by the terms of the obligation but that all were principals. But, when we reflect that the case in *Peters* is made to stand on the contract by which the parties bound themselves as principals, the difference amounts to nothing. The court says expressly, "all the evidence only establishes the fact that the party was surety, and that can have no influence against his direct admission in the obligation that he was principal."

If what has been maintained above be correct, there can be nothing in the agreement that the plaintiff was bound, by the terms of the contract, to retain in his hands 25 per cent of the money due for the work, until the building was completed and all liens satisfied. It is a begging of the question, and assuming that the defendant was a surety, when, by the terms of his contract, he was a principal. Being a principal, he was not injured by a renunciation by the plaintiff of his right to retain the 25 per cent. The plaintiff was under no obligation to do so, and his neglect can not affect his rights under the contract. The case is, as if a principal in the bond was complaining that the money had not been retained, when it was optional with the obligee whether he would retain it or not.

The plaintiff is entitled to recover the amount of all valid liens on the building which he has satisfied. If the lien was valid and subsisting, he is entitled to recover its amount, though its payment was not coerced by the process of the law. It could serve no useful purpose to subject the parties to the expense of an execution. Judge Ryland concurring, the judgment will be reversed, and the cause remanded.

Lubbering v. Kohlbrecher.

LUBBERING, Respondent, v. KOHLBRECHER, *et al.*, Appellants.

1. Where a material alteration is made in a promissory note by one unauthorized by, and without the knowledge or consent of, the owner of such note, the note is not thereby avoided as against such owner.

Appeal from St. Louis Law Commissioner's Court.

The facts are sufficiently stated in the opinion of the court.
Cline & Jamison, for appellants.

T. Spies, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The plaintiff brought suit before a justice of the peace on a promissory note for \$100. The defence was that it had been fraudulently altered after its execution, and without the consent of the makers. The plaintiff had judgment before the justice of the peace; the case was then taken by appeal to the law commissioner's court.

When the trial came off in the law commissioner's court, the defendant objected to the reading of the note in evidence, because it bore marks or evidence on its face of having been altered and erased after its execution; that the plaintiff must first explain the alterations and erasures before she could read the note in evidence. The objection was overruled, and defendants excepted. The plaintiff then read the note in evidence and closed her case.

The defendants then proved that the words "*with interest from date*" were added to the note after its execution. The defendants then asked several instructions, which were refused, and the law commissioner, on motion of the plaintiff, declared the law as follows: 1st, the plaintiff is not affected by any alteration or erasures or spoliation made on the note sued on unless the same was done by her, or by her knowledge or consent; 2d, an agent has no implied authority to do an unlawful act, so as to bind his principals, unless such act is done by

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the knowledge and consent of the principal ; 3d, if the court, sitting as a jury, shall believe from the evidence that what was written upon and erased on the note in question had no tendency to change the language and meaning thereof, then they must find for the plaintiff.

It is not necessary to notice the instructions prayed for by defendants and refused, as the two first given for the plaintiff contained the proper rule on this subject, and the case was tried upon that rule. The 3d instruction given, although not correct, had nothing to do with the case. The alteration here was material, and if made by the party or with her consent, avoided the note, and this was the principle on which the case was decided. The 3d instruction then could do no harm, as we see the case was decided by the court below with proper regard to the principles on which such questions are settled.

Greenleaf says, "if the alteration is noted in the alteration clause as having been made before the execution of the instrument, it is sufficiently accounted for and the instrument is relieved from the suspicion ; and if the alteration appear in the same handwriting and ink with the body of the instrument, it may suffice." In other words, if nothing appear to the contrary the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact, to be ultimately found by the jury, upon proofs to be adduced by the party offering the instrument in evidence." (Greenl. Ev. § 564.)

In this case, the addition of the words and the subsequent erasure of them was not brought home to the plaintiff. She is not bound by the illegal and unauthorized conduct of those who were her agents ; nor should she be affected by any act wrong in law and not within the scope of the agent's authority or business, unless the act be sanctioned or subsequently affirm-

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ed by her. In the *United States v. Spaulding*, (2 Mason, 478,) Justice Story very strongly condemned the old doctrine that every material alteration of a deed, even by a stranger, and without privity of either party, avoided the deed. He considered the old rule "as repugnant to common sense and justice, as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven; and which ought to have the support of unbroken authority, before a court of law was bound to surrender its judgment to what deserved no better name than a technical quibble." It has been strongly doubted whether an *immaterial* alteration in any matter, though made by the obligee himself, will avoid the instrument, provided it be done innocently and to no injurious purpose. But if the alteration be *fraudulently made* by the party claiming under the instrument, it does not seem important whether it be a material or immaterial part; for, in either case, he has brought himself under the operation of the rule established for the prevention of fraud. (1 Greenl. Ev. § 568.) Here the party must make the alteration—an alteration by a third person will not avoid the deed unless the party claiming consented or connived at it.

Upon the whole record, we think the court below decided the case properly. The judgment must be affirmed; the other judges concurring.

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A

ACKNOWLEDGMENT.

1. A deed executed November 16, 1819, in Illinois, by husband and wife, and acknowledged before a notary public there, is ineffectual to convey the wife's real estate in Missouri. *Reaume v. Chambers*, 36.

ACTION FOR THE DELIVERY OF PERSONAL PROPERTY.

1. In actions brought under the act of March 10, 1849, (sess. acts, 1849, p. 47,) before a justice of the peace for the recovery of personal property, the proceedings must be regulated and governed by article 8 of the practice act of 1849. *McKnight v. Crtnnton*, 559.

ADMINISTRATION.

1. An ante-nuptial agreement provided that the future wife, at the death of her husband and herself, should have "at her disposal, to dispose to her son James," certain personal property. *Held*, that the wife had a mere power of appointment; that in no case could she have any claim in her own favor against her husband's estate, growing out of this ante-nuptial agreement. *Agee v. Agee's Adm'r*, 366.
2. Where a sale of real estate of a decedent has been made under an order of the probate court for the payment of the debts of said intestate's estate upon a petition of the administrators, and the sale has been approved by said court, but the administrators have refused to make a deed of the land sold; *held*, that a court of equity can not compel the administrators to make a deed to the purchaser, nor can it, by its decree, vest the title to the land in said purchaser. *Spech v. Wohltlen*, 310.
3. Where a sale of real estate of a decedent for the payment of debts is approved by the probate court at the same term during which the sale takes place, the heir, not having notice of such approval, so that he is deprived of his appeal, may call in question such approval in a suit brought against him by the purchaser for a divestiture of title. *Ib.*
4. A sale by an administrator, under an order of the county court, of an equity of redemption in a slave, is valid, although the slave is in the

ADMINISTRATION—(*Continued.*)

possession of the mortgagee, who claims to hold absolutely, and refuses to deliver up the slave. *Phillips v. Hunter*, 484.

5. Where, in a case of the death of one of two partners, the survivor gives the bond required by the 50th and 51st sections of the first article of the administration act (R. C. 1845, p. 70), with approved securities; *held*, that such survivor can not be removed by the probate court and deprived of his right to the control and management of the partnership effects, on the ground that he has, since the giving of the bond, become a non-resident of the state. *Green's Adm'r v. Virden*, 606.

ADMISSIONS.

See EVIDENCE, 6, 8.

AFFIDAVIT.

1. On a motion for a new trial on the ground of newly discovered evidence, the affidavit of the party to the suit will not itself suffice; the affidavit of the new witness must be produced or its absence accounted for. *Boggs v. Lynch*, 563.

AGREEMENT.

See POLICY OF INSURANCE; EVIDENCE, 14; PARENT AND CHILD, 1.

1. P. & A., partners, commission and forwarding merchants in St. Louis, advertised that they would make liberal cash advances upon produce placed in their hands for sale in New Orleans, New York, or Liverpool. J. S. delivered to P. & A. 386 barrels of lard with the request that it should be "sent forward from New Orleans to Liverpool, provided your (P. & A.'s) correspondents are in a situation to do that kind of business, and have correspondents that they are satisfied will protect their and our interest." P. & A. made advances upon said lard, and shipped the same to their correspondents in New Orleans, with instructions to ship the same to Liverpool, provided it could be drawn upon so as to cover the advances made to J. S. by P. & A., with charges, &c., otherwise to sell the same in New Orleans. The New Orleans house, not being able to secure advances so as to cover the advances of P. & A., sold the lard, and failed soon after, not having rendered any account of the proceeds. *Held*, in a suit by P. & A. against J. S. to recover the advances made by P. & A., that it should be left to the jury to determine whether it was not the understanding of the parties that J. S. should look to P. & A. for the money arising from the sale of the lard; in short, whether P. & A. were not the agents for the sale of the lard, and those whom they employed, their sub-agents, for whose conduct they are liable. *Pomeroy v. Stigerson*, 177.
2. A barge was hired of A. by a steamboat, and it was agreed in writing that on the giving of notice the barge should be delivered up to A., "with the understanding that if froze up in the ice the sum above mentioned (eight dollars per day) is not to be paid, but only for the time the barge is in actual service, subject to his order, by giving notice

AGREEMENT—(Continued.)

- one trip previous to leaving port, and is to be delivered in good order, the usual wear and tear excepted." The barge was destroyed by the ice in the Mississippi, without fault on the part of the defendant. *Held*, that the steamboat was not liable on the contract for the non-delivery of the barge. Whether the steamboat assumed the obligation to return the barge at all events, and notwithstanding any overpowering force, is a question of intent, to be determined by a proper construction of the terms of the contract. (SCOTT, J., dissenting.) *McEvers v. Steamboat Sangamon*, 187.
3. A contract in consideration of refraining from bidding at a judicial sale is void. *Hook v. Turner*, 333.
 4. An ante-nuptial agreement provided that the future wife, at the death of her husband and herself, should have "at her disposal, to dispose to her son James," certain personal property. *Held*, that the wife had a mere power of appointment, that in no case could she have any claim in her own favor against her husband's estate, growing out of this ante-nuptial agreement. *Agee v. Agee's Adm'r*, 366.
 5. A surety may contract as a "principal," and by so doing will renounce the right of setting up a defence arising out of the relation of principal and surety. *Picot v. Signtago*, 587.
 6. A. and B. executed a bond whereby they obligated themselves "as principals" to build a house for C., the house to be built by A.; payments to be made as the work should progress, retaining twenty-five per cent. on the amount of work done, and the balance after the entire completion of the work, &c., to the satisfaction of the said C., and after the settlement of "all lawful claims, liens or demands against said work, on account of materials furnished or work done;" and C. to be secured "from all claims and losses." Liens were filed by material men against the building, which were paid by C. *Held*, in a suit by C. against B., that B. could not set up as a defence that C. had paid to A. the whole value of the work done, not reserving the 25 per cent.; he (C.) not knowing at the time that there were valid liens upon said building. *Ib.*
 7. In order to entitle C. to recover compensation in such a case, it is not necessary that payment of the sums for which the liens were held should be first enforced by suit and execution. All that is necessary is that they should be valid liens and enforceable. *Ib.*

ALTERATION.

1. Where a material alteration is made in a promissory note by one unauthorized by, and without the knowledge or consent of, the owner of such note, the note is not thereby avoided as against such owner. *Lubbering v. Kohlbrecher*, 596.

AMENDMENT.

See RECOGNIZANCE.

1. Where an appeal is taken from a justice of the peace in a proceeding under the landlord and tenant act, and the transcript is filed by the

AMENDMENT—(*Continued.*)

justice in the land court; *held*, that it is error to dismiss the appeal on motion of the appellee, on the ground that the recognizance stated the appeal to be to the law commissioner's court, a motion for leave to amend the recognizance having been made before the motion to dismiss was disposed of. The court should have permitted appellant to file a good and sufficient recognizance. *Matthews v. Gloss*, 169.

2. Where a new trial is granted on the motion of defendant, on condition that defendant pay the costs, there is no irregularity in allowing the plaintiff to amend the judgment (as by giving judgment for the possession of land, in accordance with the verdict of the jury, where, through inadvertence, a judgment for costs alone had been entered) after the order for the new trial is made and before the costs are paid. *Blumenthal v. Kurth*, 173.

APPEAL.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 4.

APPEAL BOND.

See RECOGNIZANCE.

APPOINTMENT.

1. An ante-nuptial agreement provided that the future wife, at the death of her husband and herself, should have "at her disposal, to dispose to her son James," certain personal property. *Held*, that the wife had a mere power of appointment; that in no case could she have any claim in her own favor against her husband's estate, growing out of this ante-nuptial agreement. *Agee v. Agee's Adm'r*, 366.

ARRAIGNMENT.

1. Where, after a prisoner has announced himself ready for trial, and a witness for the prosecution has been examined in chief—all the witnesses for the prosecution having been sworn—it is discovered that the prisoner has never been formally arraigned, and by order of court he is then arraigned and pleads not guilty, and objects to any further proceeding in the cause, asking that he may be discharged; *held*, 1st, that it is not erroneous, to so cause him to be arraigned; 2d, that it is not erroneous, the jury being re-sworn, to proceed to examine the witnesses for the prosecution, without causing them to be re-sworn. *State v. Weber*, 321.

ASSESSOR.

1. Where an assessment of a tax has been made by the assessor, and the party upon whose property the assessment has been made fails to make complaint, in respect to any error in the assessment, to the court of appeals when sitting for the correction of such errors, and the tax-books are made out and are delivered to the collector; *held*, that the ordinary judicial tribunals have no authority to stay the collection of the tax at the suit of the tax-payer. The law has provided a special tribunal for the correction of errors in the assessment of taxes, and to that resort must be had. (SCOTT, J., dissenting.) *Deane v. Todd*, 90.

B

BAILMENT.

See AGREEMENT, 2.

1. A bailee, who has a boat in charge for the purpose of repairing it, is bound to use ordinary diligence in its preservation, and is liable for any damage occasioned by launching the boat into the river at a time and under circumstances of great danger which ought to have been foreseen, and which result in the destruction of the boat, and that, too, although the actual destruction of the boat may not take place until about twelve days after the launching, by the breaking up of the ice. *Smith v. Meegan*, 150.

BETTING.

1. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendant, on, &c., at, &c., did then and there unlawfully bet property of a specified value on the result of an election which was held in a certain congressional district, in this state, on a specified day of the year, between specified parties, who were then and there running as candidates to represent the state in congress, said election then and there being authorized by the constitution of the United States and by the laws of this state, is good. *State v. Ragan*, 459.
2. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the election was for a probate judge of the county, and was held on a specified day, and was authorized by the laws of the state, is sufficient, the statute showing that the day named was the one fixed by law. *State v. Banfield*, 461.

BILL OF EXCEPTIONS.

See PRACTICE, 5, 6.

BILL OF SALE.

See SLAVES, 1, 2, 3. CONVEYANCE, 6.

1. A. owning the legal title to a steamboat, as to one half of which B. is the beneficial owner, made a bill of sale of one half of the said boat to C.; *held*, in a suit by B. against C.'s administrator, for a balance of the purchase money remaining due, that evidence is admissible, to show that the bill of sale was made by A. at the request of B., and was intended by the parties to convey the interest of B. *Bennett v. Bell's Adm'r*, 154.

BLOOD.

See DESCENTS AND DISTRIBUTIONS.

BUFFALOES.

1. Buffaloes, although domesticated, are not "cattle" within section 57 of article 3, of the act concerning crimes and punishments. (R. C. 1845, p. 364.) *State v. Crenshaw*, 457.

C

CARE.

See NEGLIGENCE. RIGHT OF SUPPORT.

CHARTER.

1. The acceptance by the Pacific Railroad of the act of March 1, 1851, amendatory of its original charter, did not discharge one, who had previously made a subscription to the capital stock of said company, from his obligation to pay calls regularly made upon such subscription; nor did the act of December 25, 1852, (Sess. Acts, 1853, p. 10,) in so far as it fixed the location of the Pacific Railroad. (*Renshaw v. Pacific Railroad*, 18 Mo. 210, affirmed.) *Pacific Railroad v. Hughes*, 291.
2. When legislative changes in a charter of incorporation of a railroad are such as consist only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute what may be considered as substantially the original object of its creation, one who has previously subscribed to the stock of said railroad company can not set up such changes as a defence at law to an action for calls upon such subscription of stock. The remedy, if any, is in equity. *Ib.*
3. The trustees of the town of Carondelet were empowered, by the act of February 6, 1839, (Sess. Acts, p. 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose;" *held*, that under this act the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for nonpayment of rent reserved, and that such forfeiture, when declared in proper form, could not be relieved against, although no demand of rent had been previously made. The corporation, in its political capacity, having required the insertion in the lease of the clause of forfeiture, it is as though it had been done by the legislature. (*LEONARD, J.*, dissenting.) *Taylor v. Carondelet*, 105.
4. A power to "annul a sale" of a lot in the St. Louis common, made under the authority of "an act to authorize the sale of the St. Louis common," approved March 18, 1835, is substantially pursued by declaring the lot "forfeited to the city of St. Louis." *Woodson v. Sktner*, 13.
5. The seventh section of the above act provided that the "board" of aldermen of the city of St. Louis might, by resolution, &c., "annul" a sale made under the said act, upon the non-payment of interest due; in a deed of the "mayor, aldermen and citizens of the city of St. Louis," dated March 10, 1836, made under said act, a power was reserved to the "mayor and aldermen" to "annul the sale" upon the non-payment of interest: *held*, that it was the intent of the act that the body in

CHARTER—(Continued.)

which the legislative power of the city should at the time reside, should annul the sale; that, consequently, a resolution of the city council, consisting of the board of aldermen and board of delegates, (to whom by the act of February 8th, 1839, the legislative power of the city had passed,) approved January 3, 1841, declaring a lot "forfeited to the city of St. Louis, was a good annulment of the sale of said lot." *Ib.*

CITY OF CARONDELET.

See FORFEITURE, 4.

CITY OF ST. LOUIS.

See FORFEITURE, 1, 2. COMMON, 1.

COMMON.

1. The city of St. Louis has a fee simple title to its common, and may, under its charter, pass such a title to a purchaser. *Woodson v. Skinner*, 13.

COMMUNITY.

1. The Spanish law superseded the French law in the district of Illinois (afterwards Upper Louisiana) as early as the year 1777. *Cutter v. Waddingham*, 206.
2. By the Spanish law prevailing here as early as 1777, persons about to be married could not, by marriage contract, introduce a foreign law, (as for example the French law,) to regulate their property relations as husband and as wife; as by stipulating for the establishment of a community between the parties according to the custom of Paris. *Ib.*
3. A. and B. being about to marry, entered into a marriage contract, dated August 5th, 1777, containing clauses of which the following is a translation: "The said future spouses to be one and common in all moveable property and immoveable conquests (en tous biens meubles, et conquests immeubles), according to the ancient custom established in this colony, to which they submit themselves by force of the present contract;" "the said future spouses take each other with the property and rights to them now belonging, and such as may happen to come and belong to them hereafter, whether by succession, gift, legacy or otherwise; which property, from whichever side it may come to them, shall enter wholly into community without any reserve." *Held*, that these clauses were ineffectual to bring a lot of one by forty arpens of land in the St. Louis prairie, owned by the husband at the time of the marriage, into a conjugal community, in any such sense, that, on the death of the husband, the wife would be entitled to one half thereof. *Ib.*

CONFLICT OF LAWS.

1. *Semble*: That lands acquired in this state in exchange for land in the state of Illinois, clothed with a trust in the latter state, will be held subject to the same trust; but the question whether the land in Illinois is held subject to a trust must be determined by the law of Illinois. *Pensenneau v. Pensenneau*, 27.

CONFLICT OF LAWS—(Continued.)

2. By a law of the kingdom of Prussia, the king, upon refunding to the proper owners, under a law of the kingdom, moneys stolen or embezzled by an officer of the post office department, while the same were passing through said department, became subrogated to the rights of said owners against the embezzling officer; *held*, that in case such embezzling officer should abscond from Prussia and come to this state, the king of Prussia may maintain an action against him in the courts of this state. *King of Prussia v. Kuepper's Adm'r*, 550.

CONSIGNOR AND CONSIGNEE.

1. P. & A., partners, commission and forwarding merchants in St. Louis, advertised that they would make liberal cash advances upon produce placed in their hands for sale in New Orleans, New York, or Liverpool. J. S. delivered to P. & A. 386 barrels of lard with the request that it should be "sent forward from New Orleans to Liverpool, provided your (P. & A.'s) correspondents are in a situation to do that kind of business, and have correspondents that they are satisfied will protect their and our interest." P. & A. made advances upon said lard, and shipped the same to their correspondents in New Orleans, with instructions to ship the same to Liverpool, provided it could be drawn upon so as to cover the advances made to J. S. by P. & A., with charges, &c., otherwise to sell the same in New Orleans. The New Orleans house, not being able to secure advances so as to cover the advances of P. & A., sold the lard, and failed soon after, not having rendered any account of the proceeds. *Held*, in a suit by P. & A. against J. S. to recover the advances made by P. & A., that it should be left to the jury to determine whether it was not the understanding of the parties that J. S. should look to P. & A. for the money arising from the sale of the lard; in short, whether P. & A. were not the agents for the sale of the lard, and those whom they employed, their sub-agents, for whose conduct they are liable. *Pomeroy v. Stigerson*, 177.

CONSTITUTIONAL LAW.

See LEGISLATURE, 1. PRACTICE IN CRIMINAL CASES, 6.

CONSTRUCTION.

See CONVEYANCE. AGREEMENT, 2. POLICY OF INSURANCE. EVIDENCE, 12, 13.

CONVERSION.

See TROVER, 1, 2, 3.

CONVEYANCE.

See EQUITY, 1, 2. HUSBAND AND WIFE, 4, 5, 6. BILL OF SALE. ACKNOWLEDGMENT. SLAVES, 1, 2. NOTICE, 1, 2, 3.

1. Where a deed, wanting words of perpetuity, is written on the back of another deed conveying an estate in fee, and contains the following clause—"have sold, ceded, released, and transferred all their part of

CONVEYANCE—(*Continued.*)

- the land sold by their co-heirs in the sale above;" *held*, that this reference is not of such a character as to enlarge the life estate conveyed to a fee simple. *Reaume v. Chambers*, 36.
2. A deed in which the interest conveyed is described as follows, to-wit: "All the right, title, interest and estate which we or either of us have or may have to a certain tract of land which the said Louis Lemonde, now deceased, but formerly resident, &c., acquired or claimed to have acquired of Auguste Conde, formerly of St. Louis, now deceased, and which land was supposed to have been situated in the Grand prairie, in said county and state, but for which land said parties of the first part have never seen any deed from said Auguste Conde to said Louis Lemonde;" is not void for uncertainty upon its face. *Hogan v. Page*, 55.
 3. The presumption of a deed of conveyance from facts and circumstances, without the production of the instrument or any direct proof of its existence, and which juries are sometimes permitted, and, if the facts warrant, directed to draw, is a disputable presumption and not a conclusive presumption, or *presumptio juris et de jure*. *Dessaunter v. Murphy*, 95.
 4. Section 3 of the "act regulating conveyances," (R. C. 1845,) does not relate to conveyances of leasehold interests. *Geyer v. Girard*, 159.
 5. Where a lessee executes to his lessor a deed of trust upon the leasehold interest to secure the payment of a note given as a part consideration for the lease, and, before the maturity of the note, the lessee is evicted by one having a paramount title, and then takes a lease of the same land from the person so evicting, this lease will not enure to the benefit of a purchaser under the deed of trust. *Id.*
 6. A parol gift of a slave to one for life, remainder to her children, then living, followed by the possession of the donee for life, is valid. *Pemberton v. Pemberton*, 138.
 7. A conveyance of real estate to W. W. P. & Co., only operates to transmit the legal title to W. W. P. *Arthur v. Weston*, 378.

CORPORATIONS.

See MUNICIPAL CORPORATIONS, 1.

1. The legislature can not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits. *Wells v. City of Weston*, 384.
2. The acceptance by the Pacific Railroad of the act of March 1, 1851, amendatory of its original charter, did not discharge one, who had previously made a subscription to the capital stock of said company, from his obligation to pay calls regularly made upon such subscription; nor did the act of December 25, 1852, (Sess. Acts, 1853, p. 10,) in so far as it fixed the location of the Pacific Railroad. (*Renshaw v. Pacific Railroad*, 18 Mo. 210, affirmed.) *Pacific Railroad v. Hughes*, 291.

CORPORATIONS—(Continued.)

3. When legislative changes in a charter of incorporation of a railroad are such as consist only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute what may be considered as substantially the original object of its creation, one who has previously subscribed to the stock of said railroad company can not set up such changes as a defence at law to an action for calls upon such subscription of stock. The remedy, if any, is in equity. *Ib.*
4. The trustees of the town of Carondelet were empowered, by the act of February 6, 1839, (Sess. Acts, p. 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose;" *held*, that under this act the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for nonpayment of rent reserved, and that such forfeiture, when declared in proper form, could not be relieved against, although no demand of rent had been previously made. The corporation, in its political capacity, having required the insertion in the lease of the clause of forfeiture, it is as though it had been done by the legislature. (LEONARD, J., dissenting.) *Taylor v. Carondelet*, 105.

COSTS.

See PRACTICE, 3. INTEREST, 3.

1. Where a partition sale is set aside on a motion which is contested by the purchaser, it is within the discretion of the court to tax the costs of the motion against him. *Neal v. Smith*, 349.
2. Where a party prosecuted as a vagrant under the statute, (R. C. 1845,) is discharged, judgment for costs may be given against the informer. *White v. Walker*, 433.
3. Where, in an action on a contract, an offer was made by the defendant in writing, under section 1 of article 23 of the practice act of 1849, to allow judgment to be taken against him for a certain sum, which offer was accepted by plaintiff and judgment entered accordingly; *held*, that defendant is not entitled to a judgment for costs, on the ground that the sum for which judgment is thus allowed to be taken is below the jurisdiction of the court. *Lee v. Stern*, 575.

COUNTY.

1. An allowance against a county in favor of an individual, will not bear interest until the warrant has been presented to the county treasurer for payment, and the treasurer's endorsement is obtained that payment was not made for want of funds in the treasury, as required by statute. *Skinner v. Platte County*, 437.

COUNTY COURT.

1. Where an assessment of a tax has been made by the assessor, and the party upon whose property the assessment has been made fails to make

COUNTY COURT—(*Continued.*)

complaint, in respect to any error in the assessment, to the court of appeals when sitting for the correction of such errors, and the tax-books are made out and are delivered to the collector; *held*, that the ordinary judicial tribunals have no authority to stay the collection of the tax at the suit of the tax-payer. The law has provided a special tribunal for the correction of errors in the assessment of taxes, and to that resort must be had. (Scott, J., dissenting.) *Deane v. Todd*, 90.

CRIMES AND PUNISHMENTS.

See PRACTICE IN CRIMINAL CASES. INDICTMENT.

1. Whether a justice of the peace, in improperly issuing a warrant for the arrest of an individual, did the same *maliciously*, is a question for the jury. *State v. Allen*, 318.
2. Where, under an indictment under section 38, of article 2, of the act concerning crimes and punishments, (R. C. 1845, p. 351,) the jury render a verdict against the defendant, and assess his punishment at \$300; *held*, that it is not erroneous to enter a fine of \$500 against the defendant. *State v. McQuaig*, 319.
3. As to what constitutes a wounding within section thirty-eight of article two of act concerning crimes and punishments. *State v. Leonard*, 499.
4. Buffaloes, although domesticated, are not "cattle" within section 57 of article 3, of the act concerning crimes and punishments. (R. C. 1845, p. 364.) *State v. Crenshaw*, 457.

CURTESY.

1. The estate of tenancy by the curtesy is coeval in existence in this state with dower. It was introduced by the territorial act of July 4th, 1807. *Reaume v. Chambers*, 36.
2. Where a tenant by the curtesy makes a conveyance, that would, if he were seized in fee, give the grantee an estate for his (grantee's) life, *held*, that the grantee takes an estate for the life of the grantor. *Ib.*
3. Where a tenant by the curtesy executes a conveyance which operates to transfer an estate for the life of such grantor, *held*, that so long as this estate is outstanding, it prevents a recovery of the land by those claiming under the wife of such tenant by the curtesy. *Ib.*
4. Actual seizin of the wife's land is not necessary to entitle the husband to curtesy. *Ib.*

D

DAMAGES.

See TROVER.

1. Where the damages awarded by the jury are excessive, and unwarranted, the supreme court will award a new trial, if the ends of justice will be subserved thereby. *Goetz v. Ambbs*, 170.
2. A party, in whipping a female slave, unintentionally but recklessly inflicted blows upon her mistress. In an action by the mistress, *held*, that

DAMAGES—(Continued.)

the defendant's liability was not limited to the damages to her person; that the jury might take into consideration the mental anguish and wounded feelings of the plaintiff. *West v. Forrest*, 338.

3. In an action of trover, for the conversion of a paper evidencing a debt, the measure of damages is *prima facie* the amount the paper calls for, though this may be reduced by showing payment, or that the amount is not justly due, or by other evidence that the value is less than it purports to be. *O'Donoghue v. Corby*, 393.
4. Money paid upon a contract which the other party fails to perform, may be recovered back as a part of the damages for the non-performance, without a demand. *Rollins v. Claybrook*, 405.

DEED OF TRUST.

1. Where a lessee executes to his lessor a deed of trust upon the leasehold interest to secure the payment of a note given as a part consideration for the lease, and, before the maturity of the note, the lessee is evicted by one having a paramount title, and then takes a lease of the same land from the person so evicting, this lease will not enure to the benefit of a purchaser under the deed of trust. *Geyer v. Girard*, 159.

DELIVERY.

See STATUTE OF FRAUDS, 2.

DEMAND.

See TROVER, 1.

1. Money paid upon a contract which the other party fails to perform, may be recovered back as a part of the damages for the non-performance without a demand. *Rollins v. Claybrook*, 405.

DEMURRER.

See PLEADING, 5.

DESCENTS AND DISTRIBUTIONS.

1. By the Spanish law of succession, which prevailed here prior to September 1st, 1807, brothers of the half-blood would, in the case of an intestacy, be preferred in the succession to paternal aunts, and that, too, although the intestate acquired the property from his father. The Spanish law paid no regard to the quantity of the blood of the intestate in the veins of one claiming to succeed to an estate, except in the case of brothers and sisters of the whole blood and their descendants, who took before, and to the exclusion of, the brothers and sisters of the half-blood; nor did it pay any regard to the line from which the property came, except in the single instance of a deceased brother, leaving both paternal and maternal goods, and half-brothers and sisters on both sides. *Cutter v. Waddingham*, 206.
2. The 12th section of the territorial act of July 4th, 1807, provided that, "There shall be no distinction in the distribution of any intestate's estate between kindred of the whole or half-blood, unless when the inheritance came to the person so seized, by descent, devise or gift of

DESCENTS AND DISTRIBUTIONS—(*Continued.*)

some one of his or her ancestors; in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance." *Held*, 1st, that the words "of the blood" exclude only those who have none of the blood of the ancestor from whom the estate came, without reference to proportion or quantity; 2d, that all such as have none of the blood are entirely excluded; as where an estate came direct to the intestate from his father, brothers of the half-blood on the one side of the mother being in that case entirely excluded from the inheritance; 3d, that this exclusion is limited to an exclusion of those who are not of the blood of the immediately antecedent ancestor; as where an estate has passed by descent to two brothers, and upon the death of one brother his half has passed to the other, the intestate, the half-brothers of such intestate on the side of the mother are not excluded from inheriting that portion of the estate that came to the intestate from his deceased brother. *Ib.*

DILIGENCE.

See NEGLIGENCE.

DOWER.

See CURTESY, 1, 2, 3, 4.

1. A widow's dower is divested by a sale in partition during coverture, although she is not joined with her husband as a party. (LEONARD, J., dissenting.) *Lee v. Lindell*, 202; *Sire v. City of St. Louis*, 206.

E

EJECTMENT.

1. Where a tenant by the curtesy executes a conveyance which operates to transfer an estate for the life of such grantor, *held*, that so long as this estate is outstanding, it prevents a recovery of the land by those claiming under the wife of such tenant by the curtesy. *Reaume v. Chambers*, 36.

ENUREMENT.

1. A. claiming under B. presented to the old board of commissioners, May 23, 1808, for confirmation, a claim to a lot of one by forty arpens. He however produced before the board no evidence of any kind showing a derivative title from B. The board, in confirming the claim, use the following language: "The board grant to the representatives of B. the lot and order a survey," &c. *Held*, that this is not a confirmation of the lot to A.; that, in order that the confirmation may enure to the benefit of A., he must show a derivative title from B. *Hogan v. Page*, 55.
2. C. M. having a Spanish concession and survey, died in 1802, leaving five children, and a widow, who afterwards married one J. M. C. J. M. C. claiming to be the representative of C. M., (whose widow, he

ENUREMENT—(Continued.)

stated in the notice of claim presented by him, he had married,) presented the claim for confirmation to the old board of commissioners; but made no proof whatever of any derivation of title from C. M. to himself. The board, October 9, 1810, confirmed the claim to C. M. *Held*, that this confirmation was not void, but enured to the benefit of the representatives of C. M. It did not enure to the benefit of J. M. C. (*Hogan v. Page*, ante, affirmed.) *Mercier v. Letcher*, 66.

3. Where a lessee executes to his lessor a deed of trust upon the leasehold interest to secure the payment of a note given as a part consideration for the lease, and, before the maturity of the note, the lessee is evicted by one having a paramount title, and then takes a lease of the same land from the person so evicting, this lease will not enure to the benefit of a purchaser under the deed of trust. *Geyer v. Girard*, 159.

EQUITY.

See FRAUDULENT CONVEYANCE, 1. PLEADING, 6.

1. Where an assessment of a tax has been made by the assessor, and the party upon whose property the assessment has been made fails to make complaint, in respect to any error in the assessment, to the court of appeals when sitting for the correction of such errors, and the tax-books are made out and are delivered to the collector; *held*, that the ordinary judicial tribunals have no authority to stay the collection of the tax at the suit of the tax-payer. The law has provided a special tribunal for the correction of errors in the assessment of taxes, and to that resort must be had. (*Scott, J.*, dissenting.) *Deane v. Todd*, 90.
2. Where a sale of real estate of a decedent has been made under an order of the probate court for the payment of the debts of said intestate's estate upon a petition of the administrators, and the sale has been approved by said court, but the administrators have refused to make a deed of the land sold; *held*, that a court of equity can not compel the administrators to make a deed to the purchaser, nor can it, by its decree, vest the title to the land in said purchaser. *Speck v. Wohltzen*, 310.
3. A. B. and C. (A. and B. having husbands living) owning land in coparcenary, an amicable partition is made and equal shares allotted to each; in making the mutual conveyances to complete and perfect the partition, B. and husband and C. convey to A.'s husband instead of to A. herself; and the deeds of A. and her husband to B.'s husband and to C. are so acknowledged as to pass only the life interest of the husband; *held*, in a suit by A. against the heirs of her deceased husband, that there is no equity in her favor to obtain a divestiture of the title that descended to the defendants from the husband of plaintiff. *Pensenneau v. Pensenneau*, 27.
4. *Semble*: That lands acquired in this state in exchange for land in the state of Illinois, clothed with a trust in the latter state, will be held subject to the same trust; but the question whether the land in Illinois is

EQUITY—(Continued.)

- held subject to a trust must be determined by the law of Illinois. *Ib.*
5. A court of equity never lends its aid to enforce a forfeiture. *Messersmith v. Messersmith*, 369.
 6. Where there is a breach of an express condition in a deed, the remedy of the grantor is by an entry and a suit at law, if necessary, to recover the possession; and the remedy of the grantee, or his heirs, is by a suit in equity to be relieved against the forfeiture upon making a just compensation, if a proper case for equitable relief exists, or perhaps by setting up this matter as a defence when sued at law for the possession. *Ib.*
 7. A mother conveyed land to her son, upon an express condition inserted in the deed, that he should provide for her maintenance during her natural life. The son having maintained his mother many years, died without making any express provision for her by will or otherwise, but leaving ample means for her maintenance, which his representatives offered to apply to that purpose; *held*, that if there was any breach of the condition, it was a proper case for equitable relief against a forfeiture. *Ib.*
 8. A court of equity has no jurisdiction to reform a will on the ground of mistake by the draughtsman in drawing the same. *Goode v. Goode*, 518.

ESTOPPEL.

See LIMITATION OF ACTIONS, 3.

EVIDENCE.

1. A person who holds himself out as a partner may be charged as a partner; and where in a petition a person is charged as partner, and the proof shows merely that he has held himself out as a partner; *held*, that this is no variance. *Rippey v. Evans*, 157.
2. A certified copy from the record of a memorandum of sale, not a Spanish archive, executed December 26, 1786, and not recorded before the year 1811, may, under the "act concerning evidence," (R. C. 1845, p. 469, 470,) be read in evidence only upon proof of such facts and circumstances as, together with the certificate of acknowledgment or proof, will satisfy the court that the person who executed the instrument is the person therein named as grantor. *Aubuchon v. Murphy*, 115.
3. A. owning the legal title to a steamboat, as to one half of which B. is the beneficial owner, made a bill of sale of one half of the said boat to C.; *held*, in a suit by B. against C.'s administrator, for a balance of the purchase money remaining due, that evidence is admissible, to show that the bill of sale was made by A. at the request of B., and was intended by the parties to convey the interest of B. *Bennett v. Bell's Adm'r*, 154.
4. Where evidence rejected is of too vague and indecisive a character to produce any effect on the finding of the facts by the court, the supreme

EVIDENCE—(Continued.)

- court will not reverse the judgment of the court below. *Conrad v. Bell's Adm'r*, 166.
5. Although parties to a suit may prove by their own oaths the loss or destruction of instruments in writing on which they rely, yet they can not be permitted themselves to testify as to the contents of such instruments. *Beachboard's Adm'r v. Luce*, 168.
 6. In suits commenced under the old system of practice, the rules of evidence, as they then existed, will govern in ascertaining the competency of a witness. *Pomeroy v. Sigerson*, 177.
 7. A letter written by the party sought to be charged as principal, not denying his liability, but regretting his inability to meet the demand, is evidence sufficient to sustain a finding by a jury of the fact of agency, although written in answer to a letter falsely stating that he had signed the note. *Higgins v. Dellinger*, 397.
 8. Where a written memorandum of a contract of sale does not purport to be a complete expression of the entire contract, and is uncertain as to the property sold, this may be designated by parol evidence. *Rollins v. Claybrook*, 405.
 9. The admissions of a constable, forming no part of the *res gesta*, are not evidence against his securities. *State v. Bird*, 470.
 10. In a suit by a father for the seduction of his daughter, the defendant will not be permitted to prove that the plaintiff had cast imputations upon the virtue of his own mother by giving evidence in a former judicial proceeding that she had had an illegitimate child before her marriage with plaintiff's father. *Grider v. Dent*, 490.
 11. In impeaching a witness, evidence of his general character for truth and veracity, among a majority of his neighbors, is inadmissible. *Amory v. Phillips*, 499.
 12. A., a member of a firm composed of A., B. and C., sold out to B. and C.; and the latter, with D. and E. as securities for the performance of their obligation, assumed to pay the debts of the partnership, and in particular a note for \$488 18, due from the partnership. B. and C. failed to pay said note, and A. having paid a judgment recovered thereon in the state of Iowa against himself and his co-partners, brought a suit against D. and E. for indemnification. *Held*, that the entire correspondence between the note set out in plaintiff's petition and that described in a transcript of the record and proceedings in the Iowa suit, would warrant the court in finding that the notes described were the same note. *Wilbur v. Clark*, 503.
 13. By the statute law of this state (see sess. acts, 1841, p. 86; R. C. 1845, p. 1077,) a "ton" of hemp is 2000 pounds avoirdupois and not 2240 pounds. *Green v. Moffet*, 529.
 14. Evidence to the effect that by custom or mercantile usage a "ton" of hemp consists of 2240 pounds instead of 2000 pounds, is not admissible in the interpretation of contracts. *Ib.*
 15. Where a dray ticket, containing an acknowledgment of the receipt of

EVIDENCE—(Continued.)

goods to be transported, also a statement of the rate of freight thus—"30 cents per 100 lbs.," is signed by a clerk of a steamboat; *held*, in a suit against the boat, that such a dray ticket is not conclusive as to the rate of freight; that the words "30 cents per 100 lbs." may be shown to have been inserted by fraud, mistake or surprise, and consequently did not express the intention of the parties. *Wood v. Steamboat Fleetwood*, 560.

16. Where in a suit against a keeper of a livery stable to recover damages for injuries sustained in consequence of the negligent driving of a carriage of defendant by one of his servants, testimony was offered on the part of defendant to show that the general character of the driver was that of a prudent and careful driver; *held*, that such testimony was properly excluded. *Boggs v. Lynch*, 563.

F

FINDING OF FACTS.

See PRACTICE, 7, 15. SUPREME COURT.

1. To induce the supreme court to interfere with the finding of the facts by the lower court, such finding must be clearly wrong; it is not sufficient that, from the evidence, the finding might have been different; it must be a strong case. *Conrad v. Bell's Adm'r*, 166.
2. Where a cause is tried by the court sitting as a jury, the finding of the facts should warrant the conclusion of law declared by the court and the judgment rendered; in reviewing the law of a case upon the facts found, the supreme court will not, from the facts, as found, infer or declare the existence of other facts. *Pearce v. Burns*, 577; *Pearce v. Roberts*, 582.

FORCIBLE ENTRY AND DETAINER.

1. In an action of forcible entry and detainer, where the defence relied on is that the entry complained of was made after an abandonment of the premises by the plaintiffs; *held*, that evidence offered by defendants to the effect that previous to the alleged abandonment and the forcible entry complained of, the plaintiffs, then being tenants of one W. C. (claiming under whom the defendants made their entry) fraudulently attorned to one J. M., is inadmissible. *Keyser v. Rawlings*, 126.
2. Where, in an action of forcible entry and detainer, one of two co-plaintiffs, who had, previous to the entry complained of, been in joint possession of the premises entered upon, dies, the survivor may recover all the damage sustained by such forcible entry and detainer. *Ib*.
3. *Quere*. Whether the estate of the deceased co-plaintiff is not entitled, in such case, to one half the sum recovered. *Ib*.

FORECLOSURE.

1. The personal representative of a mortgagor is a necessary party to a suit to foreclose a mortgage. *Miles v. Smith*, 502.

FOREIGN SOVEREIGN, OR STATE.

1. A foreign sovereign may maintain an action against a citizen of this state in the courts of this state. *King of Prussia v. Kuepper's Administrator*, 550.
2. By a law of the kingdom of Prussia, the king, upon refunding to the proper owners, under a law of the kingdom, moneys stolen or embezzled by an officer of the post office department, while the same were passing through said department, became subrogated to the rights of said owners against the embezzling officer; *held*, that, in case such embezzling officer should abscond from Prussia and come to this state, the king of Prussia may maintain an action against him in the courts of this state. *Ib.*

FORFEITURE.

1. A power to "annul a sale" of a lot in the St. Louis common, made under the authority of "an act to authorize the sale of the St. Louis common," approved March 18, 1835, is substantially pursued by declaring the lot "forfeited to the city of St. Louis." *Woodson v. Sktnner*, 13.
2. The seventh section of the above act provided that the "board" of aldermen of the city of St. Louis might, by resolution, &c., "annul" a sale made under the said act, upon the non-payment of interest due; in a deed of the "mayor, aldermen and citizens of the city of St. Louis," dated March 10, 1836, made under said act, a power was reserved to the "mayor and aldermen" to "annul the sale" upon the non-payment of interest: *held*, that it was the intent of the act that the body in which the legislative power of the city should at the time reside, should annul the sale; that, consequently, a resolution of the city council, consisting of the board of aldermen and board of delegates, (to whom by the act of February 8th, 1839, the legislative power of the city had passed,) approved Jan'y 3, 1841, declaring a lot "forfeited to the city of St. Louis, was a good annulment of the sale of said lot." *Ib.*
3. There is a marked difference between a forfeiture imposed by a statute and one arising under the contract of parties. In the one case it can not be relieved against; in the other, it may. *Ib.*
4. The trustees of the town of Carondelet were empowered, by the act of February 6, 1839, (Sess. Acts, p. 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose;" *held*, that under this act the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for nonpayment of rent reserved, and that such forfeiture, when declared in proper form, could not be relieved against, although no demand of rent had been previously made. The corporation, in its political capacity, having required the insertion in the lease of the clause of forfeiture, it is as though it had been done by the legislature. (LEONARD, J., dissenting.) *Taylor v. Carondelet*, 105.

FRAUD.

1. It is a good defence to an action on a promissory note, given as a premium note to an insurance company, that the maker was induced to give the said note by false representations of the solvency of the company, made with intent to deceive; nor is it necessary that those false representations should be actually made to the maker of the note himself; any false and fraudulent representations held out and made to the world at large for purposes of deception, as by the public statement of the condition of the company, and relied upon by the maker of the note, will constitute a good defence. *City Bank v. Phillips*, 85.
2. Where a dray ticket, containing an acknowledgment of the receipt of goods to be transported, also a statement of the rate of freight thus — "30 cents per 100 lbs.," is signed by a clerk of a steamboat; held, in a suit against the boat, that such a dray ticket is not conclusive as to the rate of freight; that the words "30 cents per 100 lbs." may be shown to have been inserted by fraud, mistake or surprise, and consequently did not express the intention of the parties. *Wood v. Steamboat Fleetwood*, 560.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See JUDGMENT, 1.

1. A. makes a fraudulent conveyance of land. A judgment is subsequently recovered against him, and the land is sold under an execution, and B. becomes the purchaser, who afterwards conveys back to A., who then conveys to C., who has notice of the facts. Held, that as A. could not have obtained equitable relief against his fraudulent deed, neither can his grantee with notice. *Perry v. Calvert*, 361.

G

GIFT.

See SLAVES, 1, 2, 3.

H

HEAD OF A FAMILY.

1. A married woman, who has been abandoned by her husband for five years, may properly be charged as the head of the family whose peace is disturbed, in an indictment under section 15 of article 7 of the act concerning crimes and punishments (R. C. 1845). *State v. Slater*, 464.

HUSBAND AND WIFE.

See MARRIAGE CONTRACT, 1. COMMUNITY.

1. *Lindell v. McNatr*, (4 Mo. 380,) explained and affirmed. The case of *Lindell v. McNatr* merely decided that a conveyance, executed by hus-

HUSBAND AND WIFE—(Continued.)

- band and wife, after January 19, 1816, (the date of the introduction of the common law) and before June 22, 1821, (the date of the "act to enable husband and wife to convey real estate belonging to the wife,") in conformity to the statute law then in force, regulating conveyances and the relinquishment of dower interests, was effectual to convey real estate belonging to the wife. After the introduction of the common law, the Spanish law had no force here. *Reaume v. Chambers*, 36.
2. In order that a deed of a married woman may effectually convey her estate, the requirements of the law must be complied with. If it appear from the face of the deed that the deed has not been executed in the manner required by law, there can be no presumption of its proper execution as against her. *Ib.*
 3. A deed executed November 16, 1819, in Illinois, by husband and wife, and acknowledged before a notary public there, is ineffectual to convey the wife's real estate in Missouri. *Ib.*
 4. A right of entry or of action for the possession of land may accrue to a married woman. A married woman having a right of entry which accrued before December 1st, 1835, may bring her action within twenty years after becoming discovert. *Ib.*

I

IMPEACHING A WITNESS.

See WITNESS 1.

INDICTMENT.

See CRIMES AND PUNISHMENTS.

1. Where a justice of the peace is indicted for misdemeanor in office, it is not necessary that the prosecutor's name should be endorsed on the indictment. *State v. Allen*, 318.
2. Where, under an indictment under section 38, of article 2, of the act concerning crimes and punishments, (R. C. 1845, p. 351,) the jury render a verdict against the defendant, and assess his punishment at \$300; *held*, that it is not erroneous to enter a fine of \$500 against the defendant. *State v. McQuaig*, 319.
3. It lies in the discretion of the court, whether it will compel the State to elect the count of an indictment on which the defendant shall be tried. (*State v. Jackson*, 17 Mo. 544, affirmed.) *State v. Leonard*, 449.
4. An indictment, under the 38th section of article 2 of the act concerning crimes and punishments, (R. S. 1845, p. 351,) which charges that the defendant feloniously assaulted and wounded M. D., wife of D. D., with a large stone held in his hand, &c., alleged to have been a deadly weapon likely to produce great bodily harm and death, and her the said M. D. did then and there strike, beat, wound, and ill-treat with

INDICTMENT—(Continued.)

great force, which was likely to produce death, &c., is sufficient. The words "with intent her the said M. D. then and there to wound and ill-treat," may be rejected as surplusage. *Ib.*

5. An indictment, under section 57 of art. 3 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendant "did unlawfully, wilfully, maliciously and feloniously kill a *certain horse beast*, to-wit, *one mare*, then and there the property of one A. B.," &c., is sufficient. Courts will take judicial notice, that horses are included in the term "cattle," as used in that section. *State v. Hambleton*, 452.
6. In such an indictment, it is not necessary to charge malice against the owner of the animal killed, nor to state the manner of killing. *Ib.*
7. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendant, on, &c., at, &c., did then and there unlawfully bet property of a specified value on the result of an election which was held in a certain congressional district, in this state, on a specified day of the year, between specified parties, who were then and there running as candidates to represent the state in congress, said election then and there being authorized by the constitution of the United States and by the laws of this state, is good. *State v. Ragan*, 459.
8. An indictment for betting on an election, under section 27 of article 8 of the act concerning crimes and punishments, (R. C. 1845,) which charges that the election was for a probate judge of the county, and was held on a specified day, and was authorized by the laws of the state, is sufficient, the statute showing that the day named was the one fixed by law. *State v. Banfield*, 461.
9. An indictment under the 37th section of the 2d article of the act concerning crimes and punishments, (R. C. 1845,) which charges that the defendants (Y. & Y.) "on, &c., at, &c., upon the body of one J. M. J., then and there being, and assault did then and there unlawfully and feloniously make, and the said Y. & Y., with sticks, rocks, stones and knives, then and there, being deadly weapons, &c., in and upon the head, face and body of him, the said J., then and there did assault and beat, with the intent him, the said J., then and there feloniously to kill, contrary," &c., is good. *State v. York*, 462.
10. A married woman, who has been abandoned by her husband for five years, may properly be charged as the head of the family whose peace is disturbed, in an indictment under section fifteen of article seven of the act concerning crimes and punishments (R. C. 1845). *State v. Slater*, 464.
11. An indictment of a road overseer for failing to keep his road in repair, under the act concerning roads and highways, (R. C. 1845,) must state, in terms or in substance, that the failure was wilful. *State v. Levens*, 469.

INTEREST.

1. An allowance against a county in favor of an individual, will not bear interest until the warrant has been presented to the county treasurer for payment, and the treasurer's endorsement is obtained that payment was not made for want of funds in the treasury, as required by statute. *Skinner v. Platte County*, 437.
2. Where, in a suit commenced in the year 1847, while the act of January 15, 1847, (sess. acts, 1847, p. 63,) regulating the interest of money, was in force, the jury found that the interest reserved—ten per cent.—exceeded the lawful rate of interest by four per cent.; *held*, that the court committed no error in deducting from the principal of the note the interest upon the same at four per cent. for the whole time the note was running, that is, from its date to the date of the judgment, and in giving judgment for plaintiff for the balance only of the principal. *Mitchell v. Griffith*, 515.
3. Nor is it error in such a case to give judgment against plaintiff for costs. *Ib.*

J

JUDGMENT.

See PRACTICE, 3.

1. A. having purchased certain lots in the city of St. Louis at an execution sale under judgments against B., brought suit against B. and also against C., in whom the legal title to said lots stood, asking that the title of C. might be divested and transferred to A. on the ground that the said lots had been conveyed to C. with intent to defraud the creditors of B. (of whom A. was one), and were thus fraudulently held by C. To this suit both defendants appeared, and B., in his answer, denied the fraud alleged, denied ownership in himself, and asserted full ownership in C. The court gave judgment for A., plaintiff, and by its decree vested the title to said lot in him free, and discharged of all claims in favor of either B. or C. *Held*, that this suit was a complete and final adjudication upon the title of B. to the lots in question, and that B. could not afterwards set up title thereto, either in his own behalf, or in behalf of his creditors, on the ground that A. acquired the property by making a fraudulent use of a judgment confessed by B. in his favor: the matter is *res adjudicata*. *Franklin v. Stagg*, 193.

JUDGMENT BY DEFAULT.

See PRACTICE, 6, 7, 14.

JUDICIAL SALE.

1. A contract in consideration of refraining from bidding at a judicial sale is void. *Hook v. Turner*, 333.

JURISDICTION.

See JUSTICE OF THE PEACE, 1. LAND COURT, 1.

1. Where an assessment of a tax has been made by the assessor, and the party upon whose property the assessment has been made fails to make complaint, in respect to any error in the assessment, to the court of appeals when sitting for the correction of such errors, and the tax-books are made out and are delivered to the collector; *held*, that the ordinary judicial tribunals have no authority to stay the collection of the tax at the suit of the tax-payer. The law has provided a special tribunal for the correction of errors in the assessment of taxes, and to that resort must be had. (SCOTT, J., dissenting.) *Deane v. Todd*, 90.
2. Where a sale of real estate of a decedent has been made under an order of the probate court for the payment of the debts of said intestate's estate upon a petition of the administrators, and the sale has been approved by said court, but the administrators have refused to make a deed of the land sold; *held*, that a court of equity can not compel the administrators to make a deed to the purchaser, nor can it, by its decree, vest the title to the land in said purchaser. *Speck v. Wohltzen*, 310.
3. Where the amount of damages claimed by the plaintiff in a suit before a justice is not expressly shown, the amount for which he accepts a judgment will be taken as the amount claimed; and although the plaintiff may in the justice's court enter a *remittitur* for the excess recovered beyond the justice's jurisdiction, he can not be permitted to do this in the circuit court on appeal, so as to give jurisdiction. *Batchelor v. Bess*, 402.
4. If, in order to authorize the supreme court to reverse a judgment, in a case commenced before a justice, for want of jurisdiction, it must appear that the question of jurisdiction was raised and passed upon in the circuit court; this is sufficiently shown by a motion for a review in which the objection is made, although a motion for a review is not applicable in such a case. *Ib.*

JUROR.

1. The rejection by the court trying a cause of a competent juror is no ground for reversal in the supreme court, there being no valid objection to the jurors empannelled. *West v. Forrest*, 344.

JURY.

See CRIMES AND PUNISHMENTS, 1.

1. The separation of a jury, in a criminal case, (an indictment for an assault with intent to kill,) after having written down and sealed their verdict and delivered the same to the officer in charge of them, though without consent and without the order of court, is not such misconduct as will authorize the supreme court to reverse and remand the cause. *State v. Weber*, 321.

JUSTICE OF THE PEACE.

1. A justice of the peace has jurisdiction of a suit to recover the balance of the purchase money of land, where the credits allowed bring the amount claimed within the sum for which the justice can entertain suits. *Musick v. Chamlin*, 175.

JUSTICES' COURTS.

See JUSTICE OF THE PEACE. JURISDICTION, 3, 4.

1. In actions brought under the act of March 10, 1849, (sess. acts, 1849, p. 47,) before a justice of the peace for the recovery of personal property, the proceedings must be regulated and governed by article 8 of the practice act of 1849. *McKnight v. Crinnaton*, 559.
2. The list of delinquents, which the road overseer is required to place in the hands of the justice, (R. C. 1845, tit. Roads and Highways, art. 1, § 45,) is for the information and government of the justice, whose duty it becomes to issue a summons against such delinquent, and is not intended as a written complaint against the party for his information. No written complaint is necessary. *Slover v. Muncy*, 391.
3. In the circuit court on appeal, after an appearance and trial on the merits before the justice, it is no ground for dismissing a proceeding, commenced under the statute in the name of a road overseer against a delinquent hand, that the summons, which is required to issue in the name of the road overseer "to the use of the road district," simply describes the plaintiff as "road supervisor," without specifying the district, this being specified in the entry of judgment. *Id.*

L

LAND COURT.

1. Whenever by the rules of equity a party is entitled to have a right to land vested in him, the remedy may be had, in St. Louis county, in the Land Court. *Speck v. Wohlien*, 310.

LANDS AND LAND TITLES.

See COMMON, 1. COMMUNITY.

1. A. claiming under B. presented to the old board of commissioners, May 23, 1808, for confirmation, a claim to a lot of one by forty arpens. He however produced before the board no evidence of any kind showing a derivative title from B. The board, in confirming the claim, use the following language: "The board grant to the representatives of B. the lot and order a survey," &c. *Held*, that this is not a confirmation of the lot to A.; that, in order that the confirmation may enure to the benefit of A., he must show a derivative title from B. *Hogan v. Page*, 55.
2. C. M. having a Spanish concession and survey, died in 1802, leaving five children, and a widow, who afterwards married one J. M. C. J.

LANDS AND LAND TITLES—(Continued.)

M. C. claiming to be the representative of C. M., (whose widow, he stated in the notice of claim presented by him, he had married,) presented the claim for confirmation to the old board of commissioners; but made no proof whatever of any derivation of title from C. M. to himself. The board, October 9, 1810, confirmed the claim to C. M. *Held*, that this confirmation was not void, but enured to the benefit of the representatives of C. M. It did not enure to the benefit of J. M. C. (Hogan v. Page, ante, affirmed.) *Mercier v. Letcher*, 66.

LEASES.

See FORFEITURE, 1, 2, 3, 4. DEED OF TRUST, 1.

LEGISLATURE.

1. The legislature can not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits. *Wells v. City of Weston*, 384.

LIMITATION OF ACTIONS.

1. A right of entry or of action for the possession of land may accrue to a married woman. A married woman having a right of entry which accrued before December 1st, 1835, may bring her action within twenty years after becoming discoverd. *Reaume v. Chambers*, 36.
2. Where in an action for the possession of land, the defence relied on is the statute of limitations, and the court finds that in the year 1818, one B., under whom defendant claimed, took possession of the tract sued for, under a deed of conveyance of the same, and let it out to various tenants at various times after the date of the purchase, until his death; that at all times since his purchase, B., and since his death his representatives have claimed the said land and exercised ownership over it, by entering upon it, by cutting timber and wood upon it, by prosecuting others for trespasses to the land, and by constantly having an agent living near the land with authority to superintend and protect it, and rent it out, and by regularly paying the taxes; that these successive possessions were actual, continuous, and adverse to the plaintiff and those under whom he claimed; *held*, that these facts found by the court warranted a judgment for defendant, notwithstanding it was also found that the land sued for was not used as a homestead or dwelling, and that during B.'s claim the land was often untenanted and uncultivated, sometimes for several years at a time; that at such times the fences were thrown down or destroyed, and the land lay open. (Scott, J., dissenting.) *Menkens v. Ovenhouse*, 70.
3. Where parties have been under disabilities so that their title to land, held adversely, has not been barred by the operation of the statute of limitations; *held*, that their failure to object to the adverse occupation, and to the making of improvements, &c., will not estop them from setting up title. *Dessaunter v. Murphy*, 95.

LIMITATION OF ACTIONS—(Continued.)

4. Where A. conveys to B. contiguous lots, by separate granting words, descriptions, and habendums, and B. builds a house upon one of the lots, and makes an enclosure about the same, and accidentally, through mistake or ignorance of the boundaries, and without any design of taking possession of it, extends the enclosure over upon the other lot, so as to embrace a small portion of said lot; *held*, that this is not a possession within the meaning of our statute of limitations; although the actual detention—"pedis possessio"—exists; there is wanting the intention on the part of the possessor, which is necessary to constitute a civil possession. *Cutter v. Waddingham*, 206.
5. *Quere*—Whether one who has taken possession of a small portion of a larger lot or tract of land, under a deed, not of the lot, but merely of whatever interest the grantor may be found to have in it, has, without any thing more, a possession extending over the whole lot, within the meaning of our statute of limitations. *Ib.*
6. The exception in section 7 of article 2 of the statute of limitations of 1845, does not apply where the debtor is a *non-resident* of the state when the cause of action accrues, but only where, being a resident, he is absent. *Thomas v. Black*, 330.
7. The rule of the common law, embodied in the maxim "*nullum tempus occurrit regi*," and adopted generally in this country, applies only to the state at large, and not to the political subdivisions thereof. The statute of limitations runs against the municipal corporations and other authorities established to manage the affairs of the political subdivisions of the state, as against private individuals. The immunity was at common law an attribute of sovereignty only. *County of St. Charles v. Powell*, 525.
8. The sums received by the several counties of this state out of the "road and canal fund" under the several acts of the general assembly, (see R. C. 1835, p. 553; Sess. Acts, 1836-7, p. 108-9,) belonged exclusively to the counties, though affected with a trust for local purposes; and the statute of limitations would run against the said counties on bonds executed in their favor by persons to whom portions of said fund had been loaned. *Ib.*
9. The fact that the obligor of such a bond becomes a judge of the county court, before the time of the limitation, ten years, expires, will not deprive him of right to set up the statute as a bar to a recovery. *Ib.*

LOSS OR DESTRUCTION OF INSTRUMENTS.

1. Although parties to a suit may prove by their own oaths the loss or destruction of instruments in writing on which they rely, yet they can not be permitted themselves to testify as to the contents of such instruments. *Beachboard's Adm'r v. Luce*, 168.

M

MALICE.

See INDICTMENT, 6.

1. Where slanderous words are spoken falsely of another, it is unnecessary to aver or prove express malice. *Hudson v. Garner*, 423.

MALICIOUS KILLING.

See INDICTMENT, 5.

MARRIAGE CONTRACT.

See COMMUNITY, 2, 3.

1. A stipulation in a marriage contract to the effect that in case the wife should survive the husband, she should receive from the estate of the husband the sum of \$200, is valid; such an instrument is not a testamentary disposition, but creates a legal liability in favor of the wife, and she may bring suit on the same after the decease of her husband, against his representatives. *Vogel v. Vogel's Adm'r*, 161.

MASTER AND SERVANT.

See EVIDENCE, 15.

1. Where one employs a person, carrying on a distinct trade or calling, to perform certain work for him, the employee being independent of the control of the employer, the latter is not responsible for any injury to third persons caused by the negligence of the employee or his workmen. *Morgan v. Bowman*, 538.
2. Where, however, the one employed to superintend the work to be done, is subject to the control of his principal, and is paid for his services by day wages, the principal is responsible for injuries to third persons caused by such employee or his servants. *Ib.*

MEASURE OF DAMAGES.

See DAMAGES, 2, 3.

MECHANIC'S LIEN.

See AGREEMENT, 6, 7.

1. An acceptance, by one having a mechanic's lien upon a building, of a deed of trust upon the same, to secure the payment, at a future day, of promissory notes given for the debt which gave rise to the lien, amounts to a waiver of the lien. *Gorman v. Sagner*, 137.
2. Where a *scire facias* to enforce a mechanic's lien is issued against the contractor who built the building against which the lien is claimed, and also against the owners thereof, and it appears on the trial that plaintiffs had not given the notice of the claim of lien to plaintiffs with-

MECHANIC'S LIEN—(Continued.)

in the time required by statute, the owners, however, not contesting in their answer the validity of the lien, on the ground of the want of the requisite thirty days' notice, and not excepting to any act of the court during the progress of the trial, and making no motion in arrest of judgment or for a new trial; *held*, that the contractor can not be permitted to attack the validity of the lien on the ground of a want of timely notice, though he may contest the plaintiffs' demand, so far as the validity and extent of the debt is concerned. *Clark v. Brown*, 140.

3. Under § 3 of act of February 24, 1843, (see Sess. Acts, 1843, p. 83,) which provided that "every person who wishes to avail himself of the benefit of the preceding sections, shall give notice to the owner, owners, or agent, within thirty days after the indebtedness accrued, or the completion of the building or improvement," &c.; *held*, that one who gives notice of his claim of lien for materials furnished, more than thirty days after the indebtedness for such materials accrues, has lost his lien by his delay, although such notice may have been given within thirty days after the completion of the buildings. (Scott, J., dissenting.) *Patrick v. Ballentine*, 143.

MORTGAGE.

1. The personal representative of a mortgagor is a necessary party to a suit to foreclose a mortgage. *Miles v. Smith*, 502.
2. An understanding between vendor and vendee, entered into at the time of sale of land, (being a parol sale under which possession is taken,) that if within a year the former should repay to the latter the purchase money, with interest, then the latter would reconvey to the former, constitutes the transaction a mortgage. *Tibeau v. Tibeau*, 77.

MOTION.

See SUPREME COURT, 6.

MUNICIPAL CORPORATIONS.

See LIMITATION, 7.

1. The trustees of the town of Carondelet were empowered, by the act of February 6, 1839, (Sess. Acts, p. 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose;" *held*, that under this act the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for nonpayment of rent reserved, and that such forfeiture, when declared in proper form, could not be relieved against, although no demand of rent had been previously made. The corporation, in its political capacity, having required the insertion in the lease of the clause of forfeiture, it is as though it had been done by the legislature. (Leonard, J., dissenting.) *Taylor v. Carondelet*, 105.

MUNICIPAL CORPORATIONS—(Continued.)

2. The legislature can not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits. *Wells v. City of Weston*, 384.

N

NEGLIGENCE.

1. A bailee, who has a boat in charge for the purpose of repairing it, is bound to use ordinary diligence in its preservation, and is liable for any damage occasioned by launching the boat into the river at a time and under circumstances of great danger which ought to have been foreseen, and which result in the destruction of the boat, and that, too, although the actual destruction of the boat may not take place until about twelve days after the launching, by the breaking up of the ice. *Smith v. Meegan*, 150.
2. Where excavations are made upon one of two contiguous lots, the proprietor making the same will be responsible for all damage caused to buildings or other property upon the adjoining lot by reason of such excavation having been negligently made. *Charles v. Rankin*, 566.
3. It is however erroneous to rule that the proprietor having the excavating done is bound to use such care and caution as a prudent man, experienced in such work, would have exercised, if he had himself been the owner of the injured building. Such a ruling tends to mislead, as one who is proprietor of both the contiguous lots might very prudently subject himself to expense and inconvenience for the protection of his building, that could not justly be imposed upon one making excavations upon an adjoining lot belonging to him. *Ib.*
4. The excavator can not set up as a defence that he used such care as his builder and superintendent, a skillful and careful person, deemed necessary. The decisive question is, whether there was actual negligence in making the excavation. *Ib.*
5. Any negligence in the performance of what is lawful which causes loss to another, is an injury which confers a right of action. *Morgan v. Cox*, 373.
6. The reasonable care which persons are bound to take in order to avoid injury to others, is proportionate to the probability of injury that may arise to others. He who does what is more than ordinarily dangerous, is bound to use more than ordinary care. *Ib.*
7. Where injury to another is caused by an act that would have amounted to trespass *vi et armis* under the old system of actions, as where one by the negligent handling of a loaded gun kills another's slave, it is no defence, it would seem, that the act occurred through inadvertence, or without the wrong-doer's intending it; it must appear that the injury

NEGLIGENCE—(Continued.)

done was *inevitable*, and utterly without fault on the part of the alleged wrong-doer. *Ib.*

NEW TRIAL.

See PRACTICE.

1. On a motion for a new trial on the ground of newly discovered evidence, the affidavit of the party to the suit will not itself suffice; the affidavit of the new witness must be produced or its absence accounted for. *Boggs v. Lynch*, 563.

NOTARY PUBLIC.

1. In actions brought under the act of March 10, 1849, (sess. acts, 1849, p. 47,) before a justice of the peace for the recovery of personal property, the proceedings must be regulated and governed by article 8 of the practice act of 1849. *McKnight v. Crinnton*, 659.

NOTICE.

See PROMISSORY NOTES, 2. MECHANIC'S LIEN, 2, 3. PRACTICE, 3.

1. Possession of real property under an unrecorded deed is not, as a matter of law, *actual notice* to a subsequent purchaser, within the meaning of our registry act. *Vaughn v. Tracy*, 415.
2. But a majority of the court are of opinion that it is *evidence* of notice, to be submitted to a jury. *Ib.*
3. The *actual notice* required by the registry act is not *certain knowledge*, but such information as men generally act upon in the transactions of life. *Ib.*

P

PARENT AND CHILD.

1. Where a step-son continues to reside in the family of his step-father after coming of age, as before, the law will not imply a contract to pay him for services rendered. *Guenther v. Birkicht's Adm'r*, 439.

PARTIES.

See PLEADING.

PARTITION.

1. A. B. and C. (A. and B. having husbands living) owning land in coparcenary, an amicable partition is made and equal shares allotted to each; in making the mutual conveyances to complete and perfect the partition, B. and husband and C. convey to A.'s husband instead of to A. herself; and the deeds of A. and her husband to B.'s husband and to C. are so acknowledged as to pass only the life interest of the husband: *held*, in a suit by A. against the heirs of her deceased husband,

PARTITION—(Continued.)

that there is no equity in her favor to obtain a divestiture of the title that descended to the defendants from the husband of plaintiff. *Pensenneau v. Pensenneau*, 27.

2. A widow's dower is divested by a sale in partition during coverture, although she is not joined with her husband as a party. (LEONARD, J., dissenting.) *Lee v. Lindell*, 202; *Sire v. City of St. Louis*, 206.

PARTNERSHIP.

1. A person who holds himself out as a partner may be charged as a partner; and where in a petition a person is charged as partner, and the proof shows merely that he has held himself out as a partner; *held*, that this is no variance. *Rippey v. Evans*, 157.
2. An arrangement between forwarding and commission merchants in St. Louis, and their correspondents in New Orleans, that on all sales of produce shipped by the St. Louis house to that in New Orleans, one per cent. of the usual commission of 2½ per cent. should be returned to the St. Louis house, does not constitute the two houses partners. *Pomeroy v. Sigerson*, 177.
3. A conveyance of real estate to W. W. P. & Co., only operates to transmit the legal title to W. W. P. *Arthur v. Weston*, 378.
4. Where, in a case of the death of one of two partners, the survivor gives the bond required by the 50th and 51st sections of the first article of the administration act (R. C. 1845, p. 70), with approved securities; *held*, that such survivor can not be removed by the probate court and deprived of his right to the control and management of the partnership effects, on the ground that he has, since the giving of the bond, become a non-resident of the state. *Green's Adm'r v. Virden*, 506.

PLEADING.

See PRACTICE. INDICTMENT.

1. Where slanderous words are spoken falsely of another, it is unnecessary to aver or prove express malice. *Hudson v. Garner*, 423.
2. Where a suit is brought to enforce a trust, with reference to specific property, and the plaintiff prays a divestiture of title; and also prays that, if the court should refuse the first prayer, the rights of plaintiff and also of defendants may be ascertained and a partition and division decreed accordingly: *held*, that the alternative relief prayed is founded on the assumption that the cause of action is wholly misconceived, and should not be granted. A plaintiff can not ask in his petition, that, if he should have mistaken his remedy, and should fail to obtain the relief prayed, another and a different cause of action may be tried. *Pensenneau v. Pensenneau*, 27.
3. The defendant may rely upon the statute of frauds as a defence to a petition for the specific performance of a parol contract to convey land,

PLEADING—(Continued.)

- although he does not set it up in his answer, but simply denies the contract. *Hook v. Turner*, 333.
4. A note is executed to three partners, two of whom upon a settlement of the partnership affairs, for value, sell and transfer by delivery their interest in the note to the third. *Held*, that the third might sue on the note in his own name. *Canebox v. Anderson*, 347.
 5. Where a party is in possession of a store, as a clerk or agent of another, his possession is that of his principal. *Coggburn v. Simpson*, 351.
 6. Where a statute creates an absolute bar by the mere lapse of time, without any exception, the defence may be made by demurrer, if the necessary facts appear in the petition. *State v. Bird*, 470.
 7. Where a slave is conveyed to a trustee to be held in trust for the use of a married woman for life, (she being entitled by the deed of conveyance to the possession of the slave,) and upon her death for the use of the children; *held*, that the wife can not in her own name and that of her husband maintain an action for the conversion of the slave. An action for the protection of the legal ownership should be brought in the name of the trustee, or in case of his death or refusal to act, or the existence of any obstacle to the ordinary legal remedy, a proper case for equitable relief might be made and such relief furnished. *Richardson v. Means*, 495.
 8. Where in a petition it was charged that the defendant, "without leave and wrongfully entered upon a certain tract of land (describing it) of which plaintiffs were the owners and in possession thereof, &c., and took from said premises a house thereon situated, used and employed as a Methodist meeting-house or church, and carried said house off," &c.; *held*, that an answer, in which defendant "denies that he wrongfully entered upon the premises and took therefrom a Methodist church or meeting-house of said plaintiffs; and the defendant charges the fact to be, that the house spoken of, was his (defendant's) property and not owned or claimed by plaintiffs," (defendant also in the answer claiming permission from one of the plaintiffs to "do as he pleased with" said house, and denying plaintiff's possession,) admits the entering and taking away of the house. *Emory v. Phillips*, 499.
 9. The personal representative of a mortgagor is a necessary party to a suit to foreclose a mortgage. *Miles v. Smith*, 502.
 10. *Quere*, as to the soundness of the doctrine laid down in *Wood v. Steamboat Fleetwood*, (19 Mo. 529,) that an allegation of the value of property claimed by plaintiff, or alleged to have been destroyed, &c., by defendant, is not admitted if not denied. *Morgan v. Bowman*, 538.

POLICY OF INSURANCE.

1. Where a policy of insurance, in which fire and ice are excepted perils, is renewed by an endorsement in which it is stated that it is "understood that the assured is not entitled to claim for any loss or damage

POLICY OF INSURANCE—(*Continued.*)

arising from *tee*;" *held*, that a second renewal by endorsement, in which it is stated that the "within policy is renewed," &c., applies to the original policy and not to the said policy as renewed by the first endorsement. A loss by fire occurring after the second renewal is not covered by the policy. *Honich v. Phenix Insurance Co.*, 82.

POSSESSION.

See SLAVES, 1, 2, 3. NOTICE, 1, 2, 3. LIMITATION OF ACTIONS, 2, 4, 5. CONVEYANCE. PRINCIPAL AND AGENT, 1, 2.

POWER.

See FORFEITURE, 1, 2. LEGISLATURE, 1. COMMON, 1. AGREEMENT, 4.

1. An ante-nuptial agreement provided that the future wife, at the death of her husband and herself, should have "at her disposal, to dispose to her son James," certain personal property. *Held*, that the wife had a mere power of appointment; that in no case could she have any claim in her own favor against her husband's estate, growing out of this ante-nuptial agreement. *Agee v. Agee's Adm'r*, 366.

PRACTICE.

See SUPREME COURT. COSTS, 3. ACTION FOR DELIVERY OF PERSONAL PROPERTY. EVIDENCE, 5. RECOGNIZANCE, 3.

1. Although parties to a suit may prove by their own oaths the loss or destruction of instruments in writing on which they rely, yet they can not be permitted themselves to testify as to the contents of such instruments. *Beachboard's Adm'r v. Luce*, 168.
2. Where an appeal is taken from a justice of the peace in a proceeding under the landlord and tenant act, and the transcript is filed by the justice in the land court; *held*, that it is error to dismiss the appeal on motion of the appellee, on the ground that the recognizance stated the appeal to be to the law commissioner's court, a motion for leave to amend the recognizance having been made before the motion to dismiss was disposed of. The court should have permitted appellant to file a good and sufficient recognizance. *Matthews v. Gloss*, 169.
3. Where a new trial is granted on the motion of defendant, on condition that defendant pay the costs, there is no irregularity in allowing the plaintiff to amend the judgment (as by giving judgment for the possession of land, in accordance with the verdict of the jury, where, through inadvertence, a judgment for costs alone had been entered) after the order for the new trial is made and before the costs are paid. *Blumenthal v. Kurth*, 173.
4. Where an order granting a new trial to a defendant, on condition of his paying costs, is after the lapse of several terms and before the payment of the costs by defendant, vacated on the motion of plaintiff; *held*, that defendant is not entitled to notice of this motion. *Id.*

PRACTICE—(Continued.)

5. Case affirmed, because no exceptions were taken to the action of the court, and no bill of exceptions filed and allowed. *State v. Wiedner*, 327; *Ames v. Btrcher*, 586.
6. A motion to set aside a judgment by default is no part of the record, unless made so by the bill of exceptions. *Loudon v. King*, 336.
7. No finding of facts is necessary upon an assessment of damages after judgment by default. *Ib.*
8. Where a partition sale is set aside on a motion which is contested by the purchaser, it is within the discretion of the court to tax the costs of the motion against him. *Neal v. Smith*, 349.
9. In a suit by husband and wife under the practice act of 1849, the affidavit of the husband is a sufficient verification of the petition. *Huntingdon v. House*, 365.
10. It is too late to object to the verification of a petition when the case is called for trial. *Ib.*
11. In the circuit court on appeal, after an appearance and trial on the merits before the justice, it is no ground for dismissing a proceeding, commenced under the statute in the name of a road overseer against a delinquent hand, that the summons, which is required to issue in the name of the road overseer "to the use of the road district," simply describes the plaintiff as "road supervisor," without specifying the district, this being specified in the entry of judgment. *Slover v. Muncy*, 391.
12. Where the amount of damages claimed by the plaintiff in a suit before a justice is not expressly shown, the amount for which he accepts a judgment will be taken as the amount claimed; and although the plaintiff may in the justice's court enter a *remittitur* for the excess recovered beyond the justice's jurisdiction, he can not be permitted to do this in the circuit court on appeal, so as to give jurisdiction. *Batchelor v. Bess*, 402.
13. If, in order to authorize the supreme court to reverse a judgment, in a case commenced before a justice, for want of jurisdiction, it must appear that the question of jurisdiction was raised and passed upon in the circuit court; this is sufficiently shown by a motion for a review in which objection is made, although a motion for a review is not applicable in such a case. *Ib.*
14. Judgment reversed because it appeared from the record that, after a judgment for costs was rendered against the plaintiff, a final judgment by default was rendered against the defendant without his appearance and without setting aside the former judgment. *McAdams v. McHenry*, 413.
15. Under the practice act of 1849, where a statement of facts is agreed upon by the parties, no finding of facts is necessary. *White v. Walker*, 433.
16. Where a party prosecuted as a vagrant under the statute, (R. C. 1845,) is discharged, judgment for costs may be given against the informer. *Ib.*

PRACTICE—(Continued.)

17. In an action against the sureties in a constable's bond, the judgment was, under the circumstances, reversed for the refusal of the court below, in the exercise of its discretion, to permit the defendants, after a motion to dismiss overruled and before judgment by default, to file their answer setting up lapse of time as a bar. *State v. Bird*, 470.
18. Where a cause is tried by the court sitting as a jury, it is not erroneous to refuse instructions asked by either party to the suit. *Wilbur v. Clark*, 503.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

See INDICTMENT. CRIMES AND PUNISHMENTS.

1. Where a justice of the peace is indicted for misdemeanor in office, it is not necessary that the prosecutor's name should be endorsed on the indictment. *State v. Allen*, 318.
2. Whether a justice of the peace, in improperly issuing a warrant for the arrest of an individual, did the same *maliciously*, is a question for the jury. *Ib.*
3. Where, after a prisoner has announced himself ready for trial, and a witness for the prosecution has been examined in chief—all the witnesses for the prosecution having been sworn—it is discovered that the prisoner has never been formally arraigned, and by order of court he is then arraigned and pleads not guilty, and objects to any further proceeding in the cause, asking that he may be discharged; *held*, 1st, that it is not erroneous, to so cause him to be arraigned; 2d, that it is not erroneous, the jury being re-sworn, to proceed to examine the witnesses for the prosecution, without causing them to be re-sworn. *State v. Weber*, 321.
4. An appeal on the part of the State can not be taken in a criminal case, where judgment has been given for the defendant on a demurrer to a plea to the indictment. This is not a case within the 10th section of article 8 of act to regulate proceedings in criminal cases. (R. C. 1845, p. 889.) *State v. Rowe*, 328.
5. It lies in the discretion of the court, whether it will compel the State to elect the count of an indictment on which the defendant shall be tried. (*State v. Jackson*, 17 Mo. 544, affirmed.) *State v. Leonard*, 449.
6. The constitutionality of a law establishing a new county can not be inquired into upon a motion to quash an indictment found in a court of such county. (*State v. Rich*, 20 Mo. 393, affirmed.) *State v. York*, 462.

PRESUMPTIONS.

1. The presumption of a deed of conveyance from facts and circumstances, without the production of the instrument or any direct proof of its existence, and which juries are sometimes permitted, and, if the

PRESUMPTIONS—(Continued.)

facts warrant, directed to draw, is a disputable presumption and not a conclusive presumption, or *presumptio juris et de jure*. *Dessaunter v. Murphy*, 95.

PRINCIPAL AND AGENT.

See MASTER AND SERVANT.

1. The agent who sells goods, of which he is in possession, as his own property, may recover the price in his own name. *Coggburn v. Simpson*, 351.
2. Where a party is in possession of a store, as a clerk or agent of another, his possession is that of his principal. *Ib.*
3. A party who is compelled to pay a note which he signed as security for another, who gave it for money borrowed by him as agent for a third party, may recover the amount directly from him for whom the money was borrowed; and it makes no difference that the agent did not disclose his agency, or that the money was loaned and the note signed by the security upon his individual credit. *Higgins v. Dellinger*, 397.
4. A letter written by the party sought to be charged as principal, not denying his liability, but regretting his inability to meet the demand, is evidence sufficient to sustain a finding by a jury of the fact of agency, although written in answer to a letter falsely stating that he had signed the note. *Ib.*

PRINCIPAL AND SURETY.

See AGREEMENT, 5, 6, 7.

1. A surety may contract as a "principal," and by so doing will renounce the right of setting up a defence arising out of the relation of principal and surety. *Picot v. Sigtago*, 587.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

See MECHANIC'S LIEN, 1.

1. It is a good defence to an action on a promissory note, given as a premium note to an insurance company, that the maker was induced to give the said note by false representations of the solvency of the company, made with intent to deceive; nor is it necessary that those false representations should be actually made to the maker of the note himself; any false and fraudulent representations held out and made to the world at large for purposes of deception, as by the public statement of the condition of the company, and relied upon by the maker of the note, will constitute a good defence. *City Bank v. Phillips*, 85.
2. Notice to several directors of a bank, taking a note by endorsement, of fraud in the consideration of the note, is notice to the bank. Such notice may well be presumed, where some of the directors of the bank

PROMISSORY NOTES AND BILLS OF EXCHANGE—(Continued.)

- are also directors of an insurance company, by whom the note was endorsed to the bank, and in whose hands the note was void for fraud. *Ib.*
3. Instruments in the following forms: "Due A. B. \$100, to be paid over to him as soon as collected at P., now in the hands of H. B. P. of that place," and "Due A. B. \$34 63 for goods purchased of him while at P., to be paid as soon as collected from my accounts at P.," are promissory notes, not mere *conditional* obligations to pay. The words "to be paid," &c., merely prescribe the time of payment by indicating the fund out of which the debtor expects to pay, and thereby securing to him the delay necessary to render it available. *Ubsdell & Pierson v. Cunningham*, 124.
 4. When all has been collected upon the claims that can be collected at all, the notes become due and payable. *Ib.*
 5. A note is executed to three partners, two of whom upon a settlement of the partnership affairs, for value, sell and transfer by delivery their interest in the note to the third. *Held*, that the third might sue on the note in his own name. *Canefox v. Henderson*, 347.
 6. Where a material alteration is made in a promissory note by one unauthorized by, and without the knowledge or consent of, the owner of such note, the note is not thereby avoided as against such owner. *Lubbering v. Kohlbrecher*, 596.

PUBLICATION.

See SUPREME COURT, 6.

R

RECOGNIZANCE OF APPEAL.

1. A voluntary dismissal of an appeal by the defendant in an action of forcible entry and detainer, is a breach of the condition of a recognizance to prosecute the appeal with effect and without delay, and the party aggrieved may have relief in an ordinary action on the recognizance. *Wilcox v. Daniels*, 493.

RECOGNIZANCE, CRIMINAL.

See PRACTICE, 2.

1. A criminal recognizance taken by a county court, as such, must be certified under the seal of the court. If taken by the judges, as magistrates, it must be certified by them, and not by the clerk of the court. *State v. Zuifle*, 467.
2. As to the essentials of a criminal recognizance. *State v. Randolph*, 474.
3. Where a recognizance is improperly certified, the defect may be amended at any time before the objection is disposed of, on such terms as will protect the party from being prejudiced by it. *Ib.*



RECOGNIZANCE, CRIMINAL—(Continued.)

4. It is not essential to the validity of a recognizance taken by a justice, conditioned that a party shall appear in court "to answer an indictment, and not depart without leave," that it should describe the offence with which the party is charged, or state the facts which gave the justice jurisdiction; nor need these facts be stated in the writ of *scire facias*. It is sufficient that they appear on the files and entries of the court. *Ib.*
5. A demurrer to a *scire facias* upon a forfeited recognizance, is not to be regarded as taken to what appears in the writ or in the recognizance, but to what appears of record. *Ib.*
6. A proceeding by *scire facias* upon a forfeited recognizance, is not a civil action within the meaning of the practice act of 1849, but a mere continuation of an existing proceeding. *Ib.*

REGISTRY ACTS.

See NOTICE, 1, 2, 3.

REPLEVIN.

See ACTION FOR THE DELIVERY OF PERSONAL PROPERTY.

RIGHT OF ENTRY.

See LIMITATION OF ACTIONS, 1.

RIGHT OF SUPPORT.

1. Although every proprietor of land has a right to the support of the soil of an adjacent lot, as a natural servitude or easement, yet this servitude does not impose upon the adjoining proprietor the obligation of furnishing an increased support where lateral pressure is increased by the erection of buildings, unless such a right of servitude has been conferred by grant or the lapse of time. *Charless v. Rnktn*, 566.
2. Where excavations are made upon one of two contiguous lots, the proprietor making the same will be responsible for all damage caused to buildings or other property upon the adjoining lot by reason of such excavation having been negligently made. *Ib.*
3. It is however erroneous to rule that the proprietor having the excavating done is bound to use such care and caution as a prudent man, experienced in such work, would have exercised, if he had himself been the owner of the injured building. Such a ruling tends to mislead, as one who is proprietor of both the contiguous lots might very prudently subject himself to expense and inconvenience for the protection of his building, that could not justly be imposed upon one making excavations upon an adjoining lot belonging to him. *Ib.*
4. The excavator can not set up as a defence that he used such care as his builder and superintendent, a skillful and careful person, deemed necessary. The decisive question is, whether there was actual negligence in making the excavation. *Ib.*

ROAD OVERSEER.

See INDICTMENT, 11.

1. The list of delinquents, which the road overseer is required to place in the hands of the justice, (R. C. 1845, tit. Roads and Highways, art. 1, § 45,) is for the information and government of the justice, whose duty it becomes to issue a summons against such delinquent, and is not intended as a written complaint against the party for his information. No written complaint is necessary. *Slover v. Muncy*, 391.
2. In the circuit court on appeal, after an appearance and trial on the merits before the justice, it is no ground for dismissing a proceeding, commenced under the statute in the name of a road overseer against a delinquent hand, that the summons, which is required to issue in the name of the road overseer "to the use of the road district," simply describes the plaintiff as "road supervisor," without specifying the district, this being specified in the entry of judgment. *Ib.*

ROAD AND CANAL FUND.

1. The sums received by the several counties of this state out of the "road and canal fund" under the several acts of the general assembly, (see R. C. 1835, p. 553; Sess. Acts, 1836-7, p. 108-9,) belonged exclusively to the counties, though affected with a trust for local purposes; and the statute of limitations would run against the said counties on bonds executed in their favor by persons to whom portions of said fund had been loaned. *County of St. Charles v. Powell*, 525.

S

SALE.

See BILL OF SALE. CONVEYANCE.

1. A. transferred to B. a negro slave, and gave a bill of sale absolute on its face, but intended merely as a security for indebtedness of A. in favor of B.; the slave, although delivered to B. at the date of the bill of sale, and retained by him for a few days, was permitted to remain in possession of A. until his death shortly after; A.'s administrator, upon the production by B. of the absolute bill of sale, thinking B. justly entitled to the slave, received from him a sum of money alleged to be the balance of the purchase money due A.'s estate, and gave a receipt for the same and surrendered the slave to B. *Held*, that this transaction did not amount to a sale of the slave by the administrator to B., nor did it cut off the equity of redemption belonging to A.'s estate. *Phillips v. Hunter*, 485.
2. A sale by an administrator, under an order of the county court, of an equity of redemption in a slave, is valid, although the slave is in the possession of the mortgagee, who claims to hold absolutely, and refuses to deliver up the slave. *Ib.*

SCIRE FACIAS.

See RECOGNIZANCE, 4, 5, 6.

SEDUCTION.

1. In a suit by a father for the seduction of his daughter, the defendant will not be permitted to prove that the plaintiff had cast imputations upon the virtue of his own mother by giving evidence in a former judicial proceeding that she had had an illegitimate child before her marriage with plaintiff's father. *Grider v. Dent*, 490.

SEIZIN.

See CURTESY, 4.

SEPARATION OF THE JURY.

See JURY, 1.

SLANDER.

1. Words charging a woman with being a "whore" are actionable *per se*. *Hudson v. Garner*, 423.
2. An inuendo in the petition, that the defendant intended by such words to charge the plaintiff with adultery, being unnecessary, may be rejected. *Ib.*
3. Where slanderous words are spoken falsely of another, it is unnecessary to aver or prove express malice. *Ib.*

SLAVES.

1. A. by instrument of writing not under seal, executed in the year 1838, conveyed to B. a negro slave; A. retained possession of the slave until his death in 1853; *held*, that B. had no title to the slave. *Jones' Administrator v. Covington*, 163.
2. Under the law as it stood in 1838, (see R. C. 1835, p. 588,) in order to perfect a gift of a slave so as to divest the title of the giver even as against himself, there must have been either a change of the possession or a recorded instrument of the character designated in the statute. Per LEONARD, J. (SCOTT, J., nonconcurring in this doctrine, holding that a deed of gift of a slave, under seal, will pass a title to such slave, notwithstanding the said statute. The common law respecting gifts was in force, notwithstanding the statute.) *Ib.*
3. A parol gift of a slave to one for life, remainder to her children, then living, followed by the possession of the donee for life, is valid. *Pemberton v. Pemberton*, 338.

SPANISH LAW.

See COMMUNITY.

1. The Spanish law superseded the French law in the district of Illinois (afterwards Upper Louisiana) as early as the year 1777. *Cutter v. Waddingham*, 207.
2. By the Spanish law prevailing here as early as 1777, persons about to be married could not, by marriage contract, introduce a foreign law,

SPANISH LAW—(Continued.)

(as for example the French law,) to regulate their property relations as husband and as wife; as by stipulating for the establishment of a community between the parties according to the custom of Paris. *Ib.*

3. By the Spanish law of second marriages, a widow, having become such when over the age of twenty-five years, on her second marriage forfeited to the children of the first marriage all the property that she may have acquired from her deceased husband, by a lucrative title, either immediately, or mediately through an intestate succession to a deceased child of the first marriage. Immediately upon the second marriage the title to the property vested in the children, she, however, retaining the usufruct during her life. *Ib.*
4. By the Spanish law of succession, which prevailed here prior to September 1st, 1807, brothers of the half-blood would, in the case of an intestacy, be preferred in the succession to paternal aunts, and that, too, although the intestate acquired the property from his father. The Spanish law paid no regard to the quantity of the blood of the intestate in the veins of one claiming to succeed to an estate, except in the case of brothers and sisters of the whole blood and their descendants, who took before, and to the exclusion of, the brothers and sisters of the half-blood; nor did it pay any regard to the line from which the property came, except in the single instance of a deceased brother, leaving both paternal and maternal goods, and half-brothers and sisters on both sides. *Ib.*

SPECIFIC PERFORMANCE.

1. The defendant may rely upon the statute of frauds as a defence to a petition for the specific performance of a parol contract to convey land, although he does not set it up in his answer, but simply denies the contract. *Hook v. Turner*, 333.

STATUTE OF FRAUDS.

1. The defendant may rely upon the statute of frauds as a defence to a petition for the specific performance of a parol contract to convey land, although he does not set it up in his answer, but simply denies the contract. *Hook v. Turner*, 333.
2. A contract was made for the sale of cattle in the field of the seller. The purchaser told the seller to keep the cattle and feed them until he sent for them, at the expense of the purchaser. The seller agreed to do so, but told the purchaser that, if any of them died, he must bear the loss, to which the latter assented. *Held*, no delivery to take the contract out of the statute of fraud. *Kerby v. Johnson*, 354.

SUCCESSION.

1. By the Spanish law of succession, which prevailed here prior to September 1st, 1807, brothers of the half-blood would, in the case of an intestacy, be preferred in the succession to paternal aunts, and that,

SUCCESSION—(Continued.)

too, although the intestate acquired the property from his father. The Spanish law paid no regard to the quantity of the blood of the intestate in the viens of one claiming to succeed to an estate, except in the case of brothers and sisters of the whole blood and their descendants, who took before, and to the exclusion of, the brothers and sisters of the half-blood; nor did it pay any regard to the line from which the property came, except in the single instance of a deceased brother, leaving both paternal and maternal goods, and half-brothers and sisters on both sides. *Cutter v. Waddingham*, 206.

SUPPORT.

See RIGHT OF SUPPORT.

SUPREME COURT.

See PRACTICE.

1. The supreme court will not reverse a judgment on the ground that the court has not permitted a party to have the opening and the closing of the case to the jury, unless such refusal has produced a wrong to the party. *Tibeau v. Tibeau*, 77.
2. Where evidence rejected is of too vague and indecisive a character to produce any effect on the finding of the facts by the court, the supreme court will not reverse the judgment of the court below. *Conrad v. Belt's Adm'r*, 166.
3. To induce the supreme court to interfere with the finding of the facts by the lower court, such finding must be clearly wrong; it is not sufficient that, from the evidence, the finding might have been different; it must be a strong case. *Ib.*
4. The supreme court will not grant a new trial on the ground that the verdict of the jury is against the weight of evidence. *Goetz v. Ambt*, 170.
5. Where the damages awarded by the jury are excessive, and unwarranted, the supreme court will award a new trial, if the ends of justice will be subserved thereby. *Ib.*
6. The Supreme Court will not disturb a judgment rendered upon an insufficient publication, unless a motion to set the same aside has been made in the inferior court. *Woods, Christy & Co. v. Mosier*, 335.
7. The rejection by the court trying a cause of a competent juror is no ground for reversal in the supreme court, there being no valid objection to the jurors empanelled. *West v. Forrest*, 344.
8. The supreme court will not reverse a judgment for the giving of an instruction which could not have prejudiced the appellant, nor for the refusal of instructions not warranted by the evidence. *Pasley v. Kemp*, 409.
9. In an action against the sureties in a constable's bond, the judgment was, under the circumstances, reversed for the refusal of the court below, in the exercise of its discretion, to permit the defendants, after a

SUPREME COURT—(Continued.)

- motion to dismiss overruled and before judgment by default, to file their answer setting up lapse of time as a bar. *State v. Bird*, 470.
10. The supreme court will not reverse a judgment of a lower court because the verdict of the jury is against the weight of evidence. *Holli-day v. Atterbury*, 512.
 11. Where a cause is tried by the court sitting as a jury, the finding of the facts should warrant the conclusion of law declared by the court and the judgment rendered; in reviewing the law of a case upon the facts found, the supreme court will not, from the facts, as found, infer or declare the existence of other facts. *Pearce v. Burns*, 577; *Pearce v. Roberts*, 582.

SURETY.

See PRINCIPAL AND SURETY.

T

TAXES.

See JURISDICTION, 1.

TON.

See EVIDENCE, 12, 13.

TROVER.

1. A refusal to deliver up a chattel to the owner on demand, without lawful excuse, is a conversion. *O'Donoghue v. Corby*, 393.
2. It is no excuse for refusing to deliver up to the owner a paper evidencing a debt, that the debt is not justly owing, nor can it be imposed as a condition to the delivery that he shall refund what he has already received upon it. *Ib.*
3. In an action of trover, for the conversion of a paper evidencing a debt, the measure of damages is *prima facie* the amount the paper calls for, though this may be reduced by showing payment, or that the amount is not justly due, or by other evidence that the value is less than it purports to be. *Ib.*

TRUST.

See EQUITY, 1, 2. DEED OF TRUST, 1.

1. *Semble*: That lands acquired in this state in exchange for land in the state of Illinois, clothed with a trust in the latter state, will be held subject to the same trust; but the question whether the land in Illinois is held subject to a trust must be determined by the law of Illinois. *Pensenneau v. Pensenneau*, 27.

V

VARIANCE.

1. A person who holds himself out as a partner may be charged as a partner; and where in a petition a person is charged as partner, and the proof shows merely that he has held himself out as a partner; *held*, that this is no variance. *Rippey v. Evans*, 157.

VERDICT.

See SUPREME COURT, 4, 5.

VERIFICATION.

See PRACTICE, 9, 10.

W

WAIVER.

1. An acceptance, by one having a mechanic's lien upon a building, of a deed of trust upon the same, to secure the payment, at a future day, of promissory notes given for the debt which gave rise to the lien, amounts to a waiver of the lien. *Gorman v. Sagner*, 137.

WARRANT.

1. An allowance against a county in favor of an individual, will not bear interest until the warrant has been presented to the county treasurer for payment, and the treasurer's endorsement is obtained that payment was not made for want of funds in the treasury, as required by statute. *Skinner v. Platte County*, 437.

WILLS AND TESTAMENTS.

See MARRIAGE CONTRACT, 1.

1. A court of equity has no jurisdiction to reform a will on the ground of mistake by the draughtsman in drawing the same. *Goode v. Goode*, 518.

WITNESS.

1. In impeaching a witness, evidence of his general character for truth and veracity, among a majority of his neighbors, is inadmissible. *Emory v. Phillips*, 499.

WOUNDING.

See CRIMES AND PUNISHMENTS, 3.

